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RECORD, CASE No. 14,139.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 173.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARTIN LOWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 8, 1890.

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1 UNITED STATES OF AMERICA,
District of Minnesota.

United States Circuit Court, Eighth Circuit.

MARTIN LOWELL, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota of the June term, A. D. 1889, of said court, held in the city of St. Paul, in said district, in the year of 1889.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 1st day of May, A. D. 1889, came the plaintiff, by his attorney, M. D. Munn, and filed in the clerk's office of said court his bill of complaint in the words and figures following, to wit:

2 United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY.

The plaintiff above named for complaint and cause of action against said defendant alleges as follows:

That he is and during all the times hereinafter mentioned has been a resident in and citizen of the State of Minnesota.

That defendant is and was during all the times hereinafter stated a corporation duly organized and existing under the laws of the State of Wisconsin and a citizen of Wisconsin and doing business in the State of Minnesota, as hereinafter stated.

That during the times hereafter stated defendant was and still is operating a railroad in the State of Minnesota between the city of St. Paul and the city of Minneapolis, as well as other points, and was and is a common carrier of passengers for hire between said cities and certain stations or points between said cities hereafter stated; that as such carrier and for the purposes thereof said defendant owns, operates on, and has control of double tracks lying near together between said cities of St. Paul and Minneapolis.

That Ridgewood park, which is located between said cities, is and was at the times hereinafter stated one of the regular stopping places of defendant for its trains; at which point defendant had and still has a station for the purpose of receiving and discharging passengers to and from its trains and passenger coaches.

3 That said station at Ridgewood park is located on the south or left-hand side of defendant's said tracks; that defendant

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1 UNITED STATES OF AMERICA,
District of Minnesota.

United States Circuit Court, Eighth Circuit.

MARTIN LOWELL, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota of the June term, A. D. 1889, of said court, held in the city of St. Paul, in said district, in the year of 1889.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 1st day of May, A. D. 1889, came the plaintiff, by his attorney, M. D. Munn, and filed in the clerk's office of said court his bill of complaint in the words and figures following, to wit:

2 United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY.

The plaintiff above named for complaint and cause of action against said defendant alleges as follows:

That he is and during all the times hereinafter mentioned has been a resident in and citizen of the State of Minnesota.

That defendant is and was during all the times hereinafter stated a corporation duly organized and existing under the laws of the State of Wisconsin and a citizen of Wisconsin and doing business in the State of Minnesota, as hereinafter stated.

That during the times hereafter stated defendant was and still is operating a railroad in the State of Minnesota between the city of St. Paul and the city of Minneapolis, as well as other points, and was and is a common carrier of passengers for hire between said cities and certain stations or points between said cities hereafter stated; that as such carrier and for the purposes thereof said defendant owns, operates on, and has control of double tracks lying near together between said cities of St. Paul and Minneapolis.

That Ridgewood park, which is located between said cities, is and was at the times hereinafter stated one of the regular stopping places of defendant for its trains; at which point defendant had and still has a station for the purpose of receiving and discharging passengers to and from its trains and passenger coaches.

3 That said station at Ridgewood park is located on the south or left-hand side of defendant's said tracks; that defendant

operates and runs all west-going passenger trains upon the north or right-hand side track and all east-going trains upon the south or left-hand track, which last-named track defendant has carelessly and negligently constructed and laid between the said Ridgewood Park station and the first-named north track and only about four feet distant from each.

That the defendant has so carelessly and negligently constructed and built its said Ridgewood Park station and at the time hereafter stated so carelessly and negligently operated and run its passenger trains that it was necessary for any passenger, and particularly this plaintiff, at the time hereafter stated, in boarding and departing from defendant's train at said Ridgewood Park station, to cross over and on said south-lying track in order to reach said station or depart from defendant's train hereafter mentioned, all of which was at the time hereafter mentioned well known to defendant and its agents and servants.

That said Ridgewood park is not a point at which defendant's east and west going trains meet according to the schedule time upon which defendant was running its said trains at the time hereafter stated.

That on the 17th day of March, 1889, this plaintiff purchased from defendant and paid for a ticket which entitled him to ride upon any of defendant's trains from the Union depot, which is a station of defendant's in the said city of St. Paul, to said Ridgewood Park station.

4 That after so purchasing said ticket and on the said 17th day of March, 1889, this plaintiff, with defendant's consent, boarded its regular passenger train which leaves said Union depot at 10 o'clock p. m. for said Ridgewood Park station; that defendant stopped its said train at said Ridgewood Park station for the purpose of allowing this plaintiff to get off from its said train and enter said station.

That just as plaintiff stepped from defendant's said train for the purpose of entering defendant's said Ridgewood Park station and just as he was crossing said south-lying track for that purpose, as he was obliged to do, owing to defendant's said careless and negligent construction thereof, defendant wrongfully, carelessly, and negligently ran and caused to be run past said Ridgewood Park station an engine or so-called wild train at a very high rate of speed, to wit, about twenty miles an hour, and in violation of that certain ordinance of the said city of St. Paul then in force, which said ordinance was duly approved on the 2nd day of March, 1871, and amended on the 19th day of September, 1882, and which said ordinance provides "that no railroad company or corporation or their agents or employ-s shall run a locomotive or train of cars or single car within the limits of the city of St. Paul at a greater speed than four miles per hour."

Which said train defendant wrongfully, carelessly, and negligently ran and caused to be run on said south-lying track between the said train, from which the plaintiff had just stepped, and the station and just at the time this plaintiff was passing over said track

to said station; and, without any fault or negligence on the part of this plaintiff, defendant wrongfully, carelessly, and negli-
5 gently ran said engine or wild train against and struck this plaintiff with the same while he was passing from said passenger train to said station, throwing him about thirty feet and rendering him insensible, and injured this plaintiff as hereafter stated.

That plaintiff was unable to see said engine or wild train before the same struck him.

That defendant was wrongfully, carelessly, and negligently running said engine or wild train rear end first, and negligently and wrongfully failed to give any signal, either by whistle or ringing of bell.

That said engine or wild train was at said time wrongfully, carelessly, and negligently operated and run with defendant's knowledge and by the agents and servants of defendant, who were then and there incapable, incompetent, and inexperienced men for such purposes, as defendant well knew and had so known prior thereto; that there was no light on the rear or approaching end of said engine or wild train.

That said station of Ridgewood park was at said time and is within the city limits of the said city of St. Paul.

That defendant carelessly and negligently failed to illuminate the platform and grounds about said station at said time, although the night was dark.

That plaintiff did not and could not see said engine or wild train as it approached said station, and plaintiff had no knowledge or warning of the approach of said engine.

That this plaintiff solely by the said wrongful, careless, and negligent acts of said defendant and without fault or negligence on his part received the following injuries at said time solely from defendant's said careless and negligent acts: Plaintiff's skull was injured, his jaw-bone broken and dislocated, and his face horribly
6 cut and mangled, and his shoulder and back seriously injured, besides many other cuts, bruises, and wounds about his body, which said injuries are and will be permanent; all of which said injuries were caused and inflicted upon this plaintiff by the said wrongful, careless, and negligent acts of defendant in so constructing and maintaining its said track and station, and especially in so carelessly and negligently causing and permitting said engine or wild train to run by said Ridgewood Park station while so allowing and requiring its passengers, and especially this plaintiff, to depart from said train, by reason of which this plaintiff has been damaged in the sum of $20,000.

Wherefore plaintiff asks judgment against said defendant for the sum of $20,000 and costs and disbursements herein.

M. D. MUNN,
Attorney for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Martin Lowell came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing pleading is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

MARTIN LOWELL.

Subscribed and sworn to before me on this 17th day of April, A. D. 1889.

[NOTARIAL SEAL.] M. D. MUNN,
Notary Public, Ramsey County, Minnesota.

(Endorsed:) Filed May 1st, A. D. 1889. Oscar B. Hillis, clerk, by L. P. Richardson, deputy.

7 And thereupon summons was duly issued out of said court under the seal thereof duly tested and in the words and figures following, to wit:

8 (Original.)

UNITED STATES OF AMERICA.

DISTRICT OF MINNESOTA, } ss:
Third Division, }

In the Circuit Court of the United States for the District of Minnesota.

MARTIN LOWELL
against
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. } Summons.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will apply to the court for the relief demanded, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 1st day of May, A. D. 1889. Issued at my office, in the city of St. Paul, under the seal of said circuit court the day and year last aforesaid.

[SEAL OF COURT.]

OSCAR B. HILLIS, *Clerk*,
By L. P. RICHARDSON, *Deputy.*

M. D. MUNN,
Plaintiff's Attorney.

8½ [Endorsed:] United States circuit court, district of Minnesota, third division. No. 615, D. Law. Martin Lowell, plaintiff, *vs.* The Chicago, Milwaukee & St. Paul R'y Co., defendant. Summons. (Original.) Returned and filed May 11th, A. D. 1889. Oscar B. Hillis, clerk, by L. P. Richardson, deputy. —— ——, plaintiff's attorney.

DISTRICT OF MINNESOTA, *ss:*

I hereby certify and return that I served the annexed summons on the therein-named Chicago, Milwaukee R'y Co. personally by handing to and leaving a true and correct copy thereof with W. G. Collins, assistant general superintendant of said company, at Minneapolis, in said district, on the 10th day of May, A. D. 1889.

WM. S. DAGGET,
U. S. Marshal,
By A. B. BRACKETT, *Deputy.*

9 And afterwards, on the 5th day of June, A. D. 1889, came the defendant-, by their attorneys, and filed in the clerk's office their answer to the bill of complaint herein, in the words and figures following, to wit:

10 Circuit Court of the United States, District of Minnesota.

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

The defendant above named for answer to the complaint of the plaintiff in the above-entitled action respectfully states and shows to the court:

Defendant admits that the plaintiff is and has been a resident and citizen of the State of Minnesota, and that the defendant is and has been a railroad corporation of the State of Wisconsin and operating a line of railroad, having a double track for the greater part of the distance between the cities of St. Paul and Minneapolis, in said State of Minnesota, as a common carrier for hire.

Defendant further admits that Ridgewood park is a station located between the depots in said cities, but that there is and has been up to the present time very little travel to and from said station, and that but few of defendant's trains stop at said station.

Defendant denies that the said station at said Ridgewood park is located on the south or left-hand side of defendant's said tracks, but alleges that said station is so constructed that there is a depot and platform both on the north side and on the south side of said tracks, with a communication between the two under said tracks, so that passengers going from St. Paul to Minneapolis on the north or west bound track of said defendant could and should alight at

11 said Ridgewood park and cross to the south side of said railroad without the necessity and danger of crossing the east-bound or south track of said defendant, and that said defendant at

and before the time of the happening of the accident mentioned in said complaint had expressly notified the said plaintiff not to cross said east-bound or south track upon the surface thereof, but to use the said depot platform on the north side of said tracks and the communication underneath the tracks aforesaid, and that said plaintiff was at the time of said accident and had been for a long time prior thereto entirely familiar with the location and construction of said depots at said Ridgewood park and of the uses thereof.

Defendant has no knowledge or information thereof sufficient to form a belief as to whether said plaintiff on the 17th day of March, 1889, purchased or paid for a ticket entitling him to ride from the Union depot in said St. Paul to said Ridgewood park, but said defendant admits that said plaintiff was on the regular passenger train which left said Union depot at ten o'clock p. m. on said day, and that defendant stopped said train at said Ridgewood park for the purpose of allowing passengers on said train to alight therefrom and enter said depot on the north side of said tracks, and that said plaintiff did alight from said train, but on the south side thereof and in the negligent manner hereinafter stated.

Defendant alleges that when said train reached the said Ridgewood Park station said plaintiff, disregarding the said notice so given to him as aforesaid, and notwithstanding plaintiff's said knowledge of the situation of the said depots at said Ridgewood park and of the communication between the same underneath
12 said tracks and of the danger of crossing said south track upon the surface thereof, and without stopping to look or looking in either direction to ascertain whether any engine or train was approaching on said track, carelessly and negligently attempted to cross the same to the southerly side thereof, and was injured in the manner hereinafter stated.

Defendant further alleges that at the time said plaintiff so carelessly and negligently started to cross said south or east bound track a freight or transfer engine of said defendant was approaching said depot on said east-bound track within full view of said plaintiff had he looked, which said engine was then and there running at a due and legal rate of speed, and which said engine before reaching said depot sounded its whistle and rang its bell in a due and legal manner, and, notwithstanding said signals of warning and notwithstanding that every effort was made to prevent the same, the said engine, without any carelessness or negligence on the part of said defendant or of any of its agents or employés, but solely through the carelessness and negligence of said plaintiff, ran into and struck said plaintiff and inflicted certain injuries upon him, the extent of which injuries this defendant has no knowledge or information thereof sufficient to form a belief.

Defendant expressly denies that said plaintiff was unable to see said engine before the same struck him; but, on the contrary, said defendant alleges that the view up said east-bound track upon which said engine was approaching was then and there clear and unobstructed for a distance of more than one-fourth of a mile, and said

plaintiff could not have failed to see said engine approaching had he looked.

13 Defendant admits that the engine which struck said plaintiff was running backwards on said east-bound track, but said defendant denies that there was no light on the said rear or approaching end of said engine, but, on the contrary, alleges that there were head-lights on both ends of said engine, and that they were then and there properly lighted and burning; and said defendant denies that its agents or servants who were then and there operating said engine were incapable, incompetent, or inexperienced, but, on the contrary, alleges that they were fully capable, competent, and experienced and had been for a long time prior thereto.

Defendant admits that the said Ridgewood park was at said time and is within the city limits of said city of St. Paul.

Defendant denies that it failed to then and there illuminate the platform and grounds of said Ridgewood Park station, but, on the contrary, said defendant alleges that said platform and grounds were then and there duly and properly illuminated.

Defendant expressly denies that it was guilty of any carelessness or negligence in the premises, but, on the contrary thereof, said defendant alleges that the said accident and injuries to said plaintiff were caused wholly and solely through and by reason of the carelessness and negligence of the said plaintiff and not otherwise.

And except as hereinbefore expressly admitted, qualified, or answered unto this defendant denies each and every allegation, matter, and thing in the said complaint contained.

Wherefore said defendant demands judgment that the plaintiff take nothing by his said action and that said defendant recover of said plaintiff its costs and disbursements thereof.

FLANDRAU, SQUIRES & CUTCHEON,
Defendant's Attorneys, St. Paul, Minn.

14 DISTRICT OF MINNESOTA, *ss:*

George C. Squires came before me personally, and, being duly sworn, doth say that he is one of the attorneys for the defendant in the above-entitled action; that the foregoing answer is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by one of the officers of said defendant is that all of said officers are absent from the district of Minnesota, where resides said defendant's attorneys.

GEO. C. SQUIRES.

Subscribed and sworn to before me this 31st day of May, A. D. 1889.

FRED. N. DICKSON,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

(Endorsed:) Filed June 5th, 1889. Oscar B. Hillis, clerk.

15 And afterwards, on the 8th day of June, A. D. 1889, came the plaintiff, by his attorney, and filed in the clerk's office his reply in the words following, to wit:

15½ Circuit Court of the United States, District of Minnesota.

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Now comes the plaintiff in the above-entitled action and, for reply to the answer of the defendant in said action, denies each and every allegation not admitted by the complaint, save and except as hereinafter admitted, qualified, or explained.

Plaintiff denies that the defendant, at the time of the accident or at any other time, maintained a station on both sides of its tracks at Ridgewood Park station, or that the station was so constructed or maintained on said 17th day of March so that passengers in going from the city of St. Paul to said railroad station could depart from defendant's trains on the north side of defendant's tracks and cross over to the south side safely, as the defendant then operated its said trains at said Ridgewood Park station.

Plaintiff further denies that said defendant ever notified him not to cross said east-bound or south-lying track upon the surface or to use any station on the north side of its tracks at said point, or to cross in any other manner than plaintiff was attempting to cross on said 17th of March when struck and injured as alleged in his complaint.

This plaintiff denies that said defendant stopped its train at said Ridgewood Park station for the purpose of allowing this plaintiff to depart therefrom in any other manner than as alleged in his complaint.

16 This plaintiff further denies that there was any carelessness or negligence whatsoever on his part in departing from the defendant's said train and attempting to enter the defendant's said station, as alleged in his complaint.

This plaintiff further denies that he could see the approaching train on the south-lying track as he departed from defendant's train and attempted to cross the same, as it was necessary for him to do in order to enter the defendant's said station, or that the same was in full view of the plaintiff.

This plaintiff further denies that it was through any carelessness or negligence on his part that he was struck by said east-going train, but that it was solely through the carelessness and negligence of the defendant that he was struck and injured, as alleged in his complaint.

Wherefore plaintiff asks for judgment as in his complaint prayed for.

M. D. MUNN,
Attorney for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Martin Lowell came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing pleading is true of his own knowledge except as to

those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

MARTIN LOWELL.

Subscribed and sworn to before me on this 4th day of June, A. D. 1889.

[NOTARIAL SEAL.] M. D. MUNN,
Notary Public, Minn.

(Endorsed:) Filed June 8th, 1889. Oscar B. Hillis, clerk.

17 And afterwards, on the 24th day of September, A. D. 1889, the following proceedings of court were had in the words following, to wit:

18 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, September 24th, 1889.

Page 282, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO. } D. Law. 615.

This cause being regularly called for trial, the plaintiff appears by his attorney, M. D. Munn, Esq., and the defendant by its attorneys, Flandrau, Squires & Cutcheon.

Thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit:

John Gleason, H. N. Davis, E. G. Barnaby, Chas. Weber, Geo. R. Holmes, D. E. Foley, Henry Smith, C. M. Dewey, E. H. Judson, P. H. Weiss, M. E. Drury, and Wm. Leip, twelve good and lawful men, who are duly sworn to try the issues joined herein.

Thereupon the trial of said cause is proceeded with as follows:

M. D. Munn, Esq., opens the case for plaintiff.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

19 And afterwards, on the 25th day of September, A. D. 1889, the following proceedings of court were had in the following words, to wit:

20 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, Sept. 25th, 1889.

Page 284, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

This day again come the parties herein, by their respective attorneys, and the jury sworn to try this cause.

Thereupon the further trial of the same is proceeded with as follows:

W. C. Merriman sworn and examined for plaintiff.
W. C. Newberry " " " " "
Arthur Hudson " " " " "
Martin Lowell " " " " himself.
Philip Fosbery " " " " plaintiff.
Dr. Ed. C. Spencer " " " " "
Dr. A. B. Ancker " " " " "

And here the plaintiff rests.

Thereupon the defendant's attorney moves the court to instruct the jury to find a verdict for the defendant.

And said motion being fully argued, duly submitted, and the court, being fully advised in the premises, overrules and denies the same.

Thereupon C. E. Flandrau opens the case for defendant.

George A. Parkhurst sworn and examined for defendant.
W. A. Parker " " " " "

P. H. Weiss, one of the jurors sworn to try this cause, moves the court to excuse him from further service in said cause.

Thereupon, by consent of the attorneys for the respective parties, it is ordered that said Weiss be, and he is hereby, excused
21 from further service as a juror in said cause, and that the further trial of this cause be proceeded with with eleven jurors.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

22 And afterwards, on the 26th day of September, A. D. 1889, the following proceedings of court were had in the following words, to wit:

23 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, Sept. 26th, 1889.

Page 286, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

This day again come the parties herein, by their respective attorneys, and the jury sworn to try this cause.

Thereupon the further trial of the same is proceeded with as follows, to wit:

P. J. Cole sworn and examined for defendant.
Frank H. Burdick sworn and examined for defendant.
Henry T. Doyle sworn and examined for defendant.
Geo. W. Smith sworn and examined for defendant.
J. B. Caldwell sworn and examined for defendant.
C. H. Lei- sworn and examined for defendant.
Joseph H. Dolenty sworn and examined for defendant.
John F. Newton sworn and examined for defendant.
And here the defendant rests.
Thereupon C. E. Flandrau, Esq., sums up the case for defendant.
M. D. Munn sums up the case for plaintiff.

The court instructs the jury, and they retire to consider of their verdict, with instructions that if they agree upon a verdict before the incoming of the court to-morrow morning to place the same under seal and return it into court by their foreman.

24 And afterwards, on the 27th day of September, A. D. 1889, the following proceedings of court were had in the following words, to wit:

25 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1889, Sept. 27th, 1889.

Page 288, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

This day again come the parties herein, by their respective attorneys, and the jury sworn to try this cause, and the jury having heretofore retired to consider of their verdict, after due consultation concerning the same and being fully advised in the premises, find and return into court their verdict in the words and figures following, to wit:

"In the case of Martin Lowell *vs.* Chicago, Milwaukee and St. Paul R. R. Co. we, the jury, find for the plaintiff in the sum of eight thousand five hundred dollars (8,500).

Dated St. Paul, Sept. 26th, 1889.

H. N. DAVIS, *Foreman.*"

It is thereupon considered, ordered, and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the aforesaid sum of eight thousand five hundred dollars ($8,500) so found to be due by the jury, besides his costs and disbursements herein, to be taxed, and that he have execution therefor.

26 In the case of Martin Lowell *vs.* C., M. & St. P. R. R. Co. we, the jury, find for the plaintiff in the sum of eight thousand five hundred dollars ($8,500).

Dated St. Paul, Sept. 26th, 1889.

H. N. DAVIS, *Foreman.*

(Endorsed:) Filed Sept. 27th, 1889. Oscar B. Hillis, clerk.

27 And afterwards, on the 12th day of December, A. D. 1889, the following proceeding of the court was had in the following words, to wit:

28 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, December 12th, 1889.

Page 367, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

This day come the parties, by their respective attorneys. Defendant's attorney presents to the court a bill of exceptions and moves the court to sign the same, and plaintiff's attorney presents amendments thereto and moves the court to make such amendments.

Thereupon said motions are duly submitted and by the court taken under advisement.

29 And afterwards, on the 23rd day of December, A. D. 1889, the following proceedings of court were had in the following words, to wit:

30 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, Dec. 23rd, 1889.

Page 380, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

Defendant's motion for the court to sign bill of exceptions as prepared and presented by its attorneys and plaintiff's motion to amend the same having been heretofore duly submitted and by the

court taken under advisement, and the court having considered the same and heretofore filed its minutes allowing certain amendments thereto, now comes the defendant and presents to the court a bill of exceptions as amended.

Thereupon said bill of exceptions is signed by the court and ordered to be filed and made a part of the records herein, which is accordingly done.

And defendant's motion to set aside the verdict heretofore rendered herein and vacate the judgment entered thereon and for a new trial of said cause coming on to be heard, the same is fully argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement.

31 Circuit Court of the United States, District of Minnesota.

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Petition for a New Trial.

To the honorable the circuit court of the United States for the district of Minnesota and the judges thereof:

The defendant in the above-entitled action respectfully petitions this honorable court and the judges thereof for a new trial in said action upon the following grounds:

1st. Excessive damages appearing to have been given under the influence of passion and prejudice.

2nd. That the verdict and judgment in said action are not nor *are* either of them justified by the evidence and that they are both contrary to law.

3rd. Errors in law occurring at the trial and excepted to by the defendant.

4th. That the evidence discloses contributory negligence
32 on the part of the plaintiff which was the or one of the proximate causes of the injuries sustained by him.

5th. That the judge who tried said cause should have instructed the jury to find a verdict for the defendant.

6th. For errors in the charge of the judge who tried the cause to the jury, excepted to by the defendant, and for divers other grounds of error appearing in the record of said case and the bill of exceptions, which is hereby made a part of this petition.

Said motion will be made and founded upon this petition, the stenographer's minutes of the evidence, the pleadings, files, records, and all the papers in said case, together with the settled bill of exceptions, all of which will be read on said motion by the defendant's counsel in support of the same.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

33 June Term, 1889.

I hereby certify that I have read the foregoing petition for a new trial made by the defendant in the above-entitled action and that I allow the same to be filed in said action in this court.

R. R. NELSON, *Judge.*

DISTRICT OF MINNESOTA, *ss:*

Charles E. Flandrau, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that the foregoing petition is true and is made in good faith and not for the purpose of delay.

CHAS. E. FLANDRAU.

Subscribed & sworn to before me this 28th day of October, 1889.

C. H. BENEDICT,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

(Endorsed:) Filed Oct. 28, 1889. Oscar B. Hillis, clerk.

34 United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Bill of Exceptions.

This action was tried before his honor Judge Nelson and a jury on the 24th day of September, 1889, and several succeeding days.

The following facts were established by the evidence:

That the defendant, on the 17th day of March, 1889, was a common carrier of passengers for hire, and was on that day operating a railroad between Saint Paul and Minneapolis.

That one of the stations on said road was Ridgewood park, within the corporate limits of Saint Paul; that the general course and direction of said road through said Ridgewood Park station was east and west.

That there was a double track on said road at that point and for some distance both east and west of it; that the trains going east or towards St. Paul — *in* the south track and the trains going west or towards Minneapolis moved on the north track. There were many unscheduled trains—freight, transfer, and wild trains—moving back and forth on said tracks both day and night.

That the tracks at said Ridgewood Park station were about
35 nine feet apart; that the passenger trains were run on schedule time between the two cities and passed said Ridgewood Park station; that during the day there were many trains moving on both of said tracks; that between the hours of nine and eleven in the evening there were only two passenger trains passing said Ridgewood Park station, one going east and the other going west; that there were no trains of said defendant scheduled to meet at

said Ridgewood Park station; that the west-going train, upon which plaintiff was a passenger, reached Ridgewood park at 10.10 p. m., and the only scheduled train that would pass Ridgewood Park station going east was due fifteen minutes later, which fact was well known to the plaintiff.

That the railroad company had erected two depots at Ridgewood Park station, one on each side of the tracks—one south of the south track and one north of the north track and opposite to each other; that each of these depots was supplied with a platform for the accommodation of passengers getting onto and alighting from the cars, one of which platforms was on the south side of the south track and the other was on the north side of the north track.

That the only depot used by the defendant was the one situated on the south side of the tracks; that all the tickets were sold in said depot on the south side; telegraph office, baggage-room, and waiting-room were there, and that the said station on the north side was closed, and that it had never been used by the defendant in any way as a depot.

That at the east end of each of these depots there was a flight of steps leading down about fifteen or twenty feet to Victoria
36 street, which at that point passed under the two tracks, and the tracks passed over the street by means of an iron bridge, and it was possible for passengers to go from one depot to the other by the way of these steps and said Victoria street, but that Victoria street on the 17th day of March, 1889, was not graded or in any way improved, but was a natural ravine passing under the tracks at said Ridgewood Park station.

That Victoria street about the said station and underneath the tracks was marshy, muddy, and wet at that time; that the steps leading down on the north side from the north depot came down only to within two feet of the ground, and that passing in front of said steps at the bottom thereof was a stream of water which ran from there over the surface and in a zigzag direction down Victoria street and under said tracks.

That said stream varied in width from two to six feet and in depth from three or four inches to two feet, and that the ground under said tracks at said Victoria street was uneven and irregular, and that there were no lights or any illumination whatever along Victoria street at that point and under said tracks, and the night was dark. It was customary for all persons living on the south side of said tracks at said station to cross over said south-lying tracks in going to their homes, and not under the tracks by Victoria street, which custom was well known to the defendant.

That there was no planking between the two depot platforms, except at the easterly end of the platforms across the tracks at Ridgewood Park station, but the surface of the ground was occupied by the tracks and ties as on any other part of the road.

37 That the platform on the north side was lighted with two large kerosene lamps on posts, and the south platform was furnished with the same kind and number of lamps, but there is

conflicting evidence as to whether one of these lamps was burning on the night of the accident.

The north-side building was closed, but the platform on the north side was in good order for the embarkation and debarkation of passengers, and was of the same size of the one on the south side; that the plaintiff was, at the time of the accident, a man about thirty-six years of age, in full possession of all his faculties; that he lived in a house situated on the south side of the tracks, about one thousand feet west of the depots and about two hundred and fifty feet south of the tracks; that he had lived there prior to the accident continuously for about six months, and that the only way plaintiff could reach his home after alighting from defendant's train at said station was to cross over the south-line track of the defendant's road except through Victoria street; that he was in the habit of taking the cars at Ridgewood Park depot for Saint Paul about twice each week during the said residence at the point mentioned, and would return from St. Paul by the trains of defendant and debark at Ridgewood Park station.

That in so doing plaintiff had always boarded and departed from the defendant's train at said Ridgewood Park station, on the south side of the same, as he did on the night the accident in question occurred; that he has worked as a laborer on the streets in the neighborhood of the depot, and was familiar with it and its surroundings.

That on the afternoon of the 17th day of March, 1889, he purchased a round-trip ticket at the Ridgewood Park depot for
38 St. Paul and return, and went to St. Paul, leaving St. Paul on his return home at 10 p. m; that he was with a companion named P. Fosberg, both plaintiff and Fosberg riding in the smoking car, which was on the rear end of the train, and was a combination car divided by a partition in the middle, the rear half being for baggage and the front half for passengers desiring to smoke.

That the train was composed of an engine, tender, two passenger coaches, and this combination car; that in each end of the smoking apartment of the combination car there was posted up notices or signs in large printed letters as follows, which could be plainly seen and read by all passengers in the car: "Passengers leaving this car at the forward end will turn to the right; if at the rear end will turn to the left, and avoid danger from trains on the opposite track."

That plaintiff could read English. The plaintiff testified that he had never seen the sign; that the plaintiff most generally rode in the smoking car; that the train arrived at the Ridgewood Park station at about ten minutes past ten o'clock p. m. and pulled in with the cars opposite the north platform, and two ladies and five or six gentlemen alighted, all on the north side of the train and on the north platform; that there was a conductor, a ticket collector, and a brakeman on the train, and as the train stopped the plaintiff and Mr. Fosberg got up and passed out of the front door of the smoking car, Mr. Fosberg being first, and the plaintiff following.

On the platform they were met by the collector, who was standing in front of and a little to the north side of the door, and who asked for their tickets, which they delivered to him, Fosberg first and plaintiff after him. They immediately left the car on the
39 south side and started across the space between the tracks and the south track towards the south platform, Fosberg being about ten feet in advance of plaintiff. The collector saw them getting off on the south side and said nothing to them, but immediately, on receiving their tickets, entered the smoking car.

That before the plaintiff had time to alight from said car the train had begun to move slowly away from the station.

The said conductor or ticket collector saw both Fosberg and the plaintiff turn and step down the steps towards the south side of the car to cross over to the side station and raised no objection to or did not caution either of them against so doing.

That plaintiff in stepping down from said car took hold of the iron railing on the end of the platform on the right-hand side and stepped down with the left foot first and faced towards the west up the south-line track.

That plaintiff saw no train coming on the south-line track and Fosberg, who had already crossed over said track ahead of him, saw or heard no train coming from the west on said south-line track; that just as soon as plaintiff stepped fron the said car he started towards said station across the south-line track for the purpose of going to his home; that just as he was crossing said track he was struck by a wild train coming from the west and which was being run backwards on the south-line track and was knocked a distance of thirty feet, falling upon the platform of the said station a little to the east of the center thereof.

Several witnesses swore that the train had a head-light burning at both ends, and several witnesses swore that they saw no head-light on the end approaching the east and the depot.

40 There was conflicting evidence as to the rate of speed *of* in which the engine was moving before and at the time it reached the station, some witnesses putting it as high as twenty miles an hour and some as low as five or six. Several witnesses swore that the engine whistled for the station about a quarter of a mile before reaching it, and that its bell was rung all the way from where it whistled to the station, and several witnesses swore that they heard neither whistle or bell. The crew of the engine on it at the time was an engineer, fireman, conductor, and brakeman.

Fosberg crossed the south track and got on the platform safely and before the arrival of the engine, and was about ten feet in advance of plaintiff when plaintiff attempted to step across the south rail of the south track, and Fosberg, seeing the engine coming, called out, "Look out, Martin," to the plaintiff, but plaintiff was struck by the corner of the tender and knocked onto the south platform.

That the crew who were on the wild train, consisting of the fireman, brakeman, and conductor, saw said west-going passenger train as it came into said Ridgewood Park station and as it stopped there to receive and discharge passengers and knew that it stopped for

that purpose. Plaintiff introduced the general rule No. 66 of the defendant, in regard to the running of its trains, which is as follows: "When a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite each other and proceed slowly until trains are past."

That the said train did not in any way stop until it had run far past said station and until after plaintiff was struck.

That the conductor of the passenger train after seeing his
41 passengers off the train on the north platform gave the signal to his engineer to go ahead and got upon the platform of one of the coaches, and, seeing the plaintiff and Fosberg going in the direction of the approaching engine, called to them as loud as he could to look out for themselves; that there was unobstructed view up the tracks to the west from any point at the Ridgewood Park depot of at least 1,500 feet, and a train approaching could be een that distance.

There is conflicting evidence as to whether the passenger train was moving westward or standing still when the engine from the west reached a point opposite the passenger engine.

During the progress of the trial and while the plaintiff was making his case-in-chief his counsel asked plaintiff, who was testifying as a witness in the case on his own behalf, the following questions:

Q. As you go in and out from this station on what side were you in the habit of getting off of the cars?

A. On the south side.

Q. On the same side you got off this night?

A. Yes, sir.

Q. Have you seen other people there get on and off that way?

A. Yes, sir.

Q. Did any one ever object to your doing that? Did any one ever tell you not to do that?

A. No.

This testimony being given without objection.

That thereafter and later in the examination-in-chief plaintiff's
42 counsel asked him the following questions:

"Have you seen other people get off and on at that station, on the south side of the tracks going to and fro there, about the 17th day of March, 1889, and prior thereto for a short time?"

To which question the counsel for the defendant objected on the ground that it was immaterial, incompetent, & irrelevant.

The court overruled the objection, and the counsel for the defendant duly excepted to the ruling of the court.

Whereupon the witness answered:

"I don't know exactly about that. I have seen them before and after it."

The further question was put to the witness Martin Lowell by the counsel for the plaintiff as follows:

"Did you ever see anybody who was going over on the south side

of the tracks—off to the south—to get off on the north side and go down these steps and under the bridge?"

The counsel for the defendant objected to this question on the ground that it was immaterial, incompetent, and irrelevant. The court overruled the objection and the counsel for the defendant duly excepted to the ruling of the court.

Whereupon the witness answered: "No, sir; I didn't."

During the course of the trial Philip Fosberg, a witness on the part of the plaintiff, was asked the following question by the counsel for the plaintiff:

"About the 17th day of March, 1889, and a short time prior to that had you seen other people get off on the south side?"

To this question counsel for the defendant objected on the ground that it was immaterial, incompetent, and irrelevant; which objection was overruled by the court, and to which ruling the counsel for the defendant duly excepted.

Whereupon the witness answered as follows: "Yes, sir."

When the testimony on the part of the plaintiff was closed the counsel for the defendant moved the court to instruct the
43 jury to find a verdict for the defendant on the ground that the plaintiff was proven to have been guilty of contributory negligence on leaving the train on the south side in disobedience of the rules and notice of the defendant and in not looking for and seeing the coming engine and avoiding the same.

The court denied the motion, and the counsel for the defendant duly excepted to the ruling of the court.

The evidence on the part of the defendant was then introduced. There was no evidence in the case from either side showing or tending to show that any reason or cause existed for the plaintiff leaving the cars on the south side instead of the north side except as above set out.

The court then charged the jury as follows:

"GENTLEMEN OF THE JURY: This action is brought to recover damages for a personal injury. The plaintiff charges that he suffered injuries through the negligence of the defendant, and he has brought this suit to recover damages for such alleged injuries, so the gist of the action is the negligence of the defendant.

The injury is admitted, undisputed, and uncontradicted, and in order to entitle the plaintiff to recover under any circumstances the burden of proof is upon him to show that the injuries which he suffered were due to the negligence of the defendant.

The plaintiff is a citizen of the State of Minnesota; the defendant is a railroad company authorized to construct and operate roads in the State of Minnesota, although it is a foreign corporation
44 chartered by the State of Wisconsin. It operates a road between St. Paul and Minneapolis, called the Short Line road, with which all of us are familiar. This road, after it leaves the Mississippi river at some distance above what is called Chestnut street, in this city, runs for a short distance with a single track, and thence with two tracks to Minneapolis. Within the city limits of

St. Paul and Minneapolis there are several stations built by the company for the ingress and egress of passengers at those points.

This injury occurred at a station called Ridgewood park, about ten minutes' ride, according to the evidence, from the Union depot at the foot of Jackson street, in this city. The testimony is that this passenger train was a train that left the Union depot at ten o'clock at night, and its time to leave Ridgewood park was ten minutes after ten. At this point there are two stations built by the company, one on each side of the track. The one on the south side of the track is occupied by the ticket agent and the telegraph operator, and is the principal station at that point used by the company for the sale of its tickets to persons going either to Minneapolis or in the opposite direction to St. Paul. The north depot, as uncontradicted evidence shows, is not occupied, but there is a platform there which was erected by the company for the safe exit of passengers from the train on that side—that is, from the west-bound trains going from St. Paul to Minneapolis. This injury occurred on the night of the 17th of March, 1889, and it occurred by the plaintiff being struck by a single engine, called a transfer engine, running from the transfer station, which is nearer Minneapolis, towards St. Paul.

45 The engine was backing down, but it had, as is claimed by the defendant, although this is in dispute, and so for you to determine, a head-light upon both ends. However that may be, it was an engine that struck the plaintiff and inflicted the injuries for which he claims damages in this suit.

Now, the first issue for you to determine from the evidence is, was the defendant guilty of negligence in running its engine at the time the plaintiff was injured? And in determining that you must take into consideration the facts as developed by the testimony, that the passenger train was either stopped or in the act of stopping or just leaving this station at Ridgewood park on the north side, and that passengers were alighting or in the act of alighting at that point, and you are to say whether, from the evidence in this case, that engine was running with care and caution when it was known by the engineer of the transfer engine that the passenger train was there, and that passengers in all probability would alight, and that some of them would be likely to alight on that side; for whatever might be the duty of a passenger and whatever might be his obligation to obey the rules and regulations of the company, passengers, some of them, might disobey those rules that made it his duty to alight on one side of the car in leaving it, might disobey that order and alight on the opposite side. You are to say whether under the testimony this engine was operated and running at a careful rate of speed for the protection of the passenger who might alight on that side. The testimony as to the speed at which this transfer engine was running varies from six miles up to twenty miles an hour. Some evidence on the part of the defendant of persons who were upon the train is that just before the passenger train was met

46 the transfer engine was running at the rate of ten to twelve miles an hour, and that brakes were put upon it so as to slow it down, but there is no evidence in this case going to show that

that train was passing the passenger train at that station at a less speed than six miles an hour.

You are to state under all the circumstances of this case whether the company defendant, its agents or employés, in the operation of this train, were exercising reasonable and ordinary care for the protection of persons and passengers who might alight at that station.

If these agesnts or employés were not so doing, then the company is guilty of negligence in the operation of this engine at that time. But if you should determine that the company was exercising all the care that the law required of them, then the plaintiff cannot recover under any circumstances, for he bases his cause of action on the fact and he is compelled to *rpo*ve by a preponderance of evidence that the defendant was guilty of negligence in the running of that engine at that time. On the other hand, if you find that the defendant was careless in the running of that engine at that time, then the plaintiff under those circumstances cannot necessarily recover from that fact alone. For it is set up in the answer in this case that the plaintiff himself was guilty of negligence which contributed to this injury.

This is a defense, and upon that point the burden of proof is shifted from the plaintiff to the defendant, and he must prove by a preponderance of evidence that the plaintiff himself was guilty of negligence which contributed to his own injury. The stress in this case, it seems to me, gentlemen, lies upon that issue, and that is the second issue which you are to consider.

47 The plaintiff was injured by alighting on the side of the train opposite the north platform and proceeding to cross the track towards the south, upon which this east-bound engine was passing. He lived on that side of the tracks and nearer to Minneapolis, but there was a station there, and he entered the train and left it there. The law implies in the contract for the carriage of passengers upon railroads, they beme common carriers, that they will not only exercise the highest degree of care for the safe transportation of their passengers, but that they will provide safe and convenient modes of ingress and egress for their passengers.

But while this obligation rests upon the common carrier of passengers, there is a reciprocal obligation on the part of the passenger that he will obey all reasonable rules and regulations adopted by the company for the safety of their passengers either in entering the cars or in leaving them ; and if the company has built a platform, the mere existance of a platform at a station is evidence that it is a point at which the company under that regulation permits passengers to leave or enter the cars. I say that there is a reciprocal obligation on the part of the passenger when he leaves the car or station to leave it by going upon that platform. But there may be some justifiable necessity or some existing necessity for the passengers leaving it on the opposite side and not obeying what the law says is a reasonable regulation adopted by the company for the safety of the passenger.

In this case the effort is made by the plaintiff to show that there was a necessity for his alighting upon the side opposite to the plat-

form and proceeding across in the direction in which he did
48 when he was struck. It is well known, and I need hardly state it to you, that a railroad company's track over which trains are constantly passing is a place of great danger, and a man who voluntarily and unnecessariiy goes upon that track must expect that he may be injured, and he must exercise great care under every circumstance; but if he is there by necessity no railroad company can be justified in wantonly or wilfully running him down. They must exercise great care and caution for the protection of the person from any unlawful or criminal act, and if he is lawfully there from necessity they must exercise ordinary and reasonable care for his protection. So I say, unless there is some existing necessity established by the testimony in this case authorizing the plaintiff to alight from that side of the train and cross over those tracks, he cannot recover in this action. He would be guilty of contributory negligence in so doing.

Has he shown or does the evidence show that there was any existing necessity in this case for the plaintiff alighting on that side and crossing over? At this station it appears that there were two stairways, one for each station, leading down to what is known now as Victoria street, so called then, but not opened.

There was a bridge over this street, and there was a passage for passengers to pass down one pair of stairs and go under this bridge and then up the other pair of stairs and so avoid passing over the tracks. There does not appear to be mush stress laid here with regard to the fact of the alighting of the passengers to take that route under the circumstances as developed by the evidence. For if you find that that was not a convenient and safe route of passengers to take in the night-time on as dark a night as this was
49 at the time, then under any circumstances the company cannot complain that a passenger did not proceed down one pair of stairs and pass under this bridge and go upon the platform on the other side by the other stairs. But it is claimed here on the part of the plaintiff that the customary mode of crossing by passengers from the north depot by passengers who had arrived there to the south depot was over the south track and that the same was known to the company. If that was the customary route known to the company, if passengers who intended to embark on that train going to Minneapolis or passengers who alighted there who were living on the south side of the track went customarily over that route, then the mere fact that the plaintiff did cross there in order to reach his home cannot be considered of itself negligence. You are to say whether, under the circumstances of this case, the plaintiff should not have obeyed the rules and regulations of the company and have alighted upon that platform.

There is a discrepancy or a dispute or contradiction with regard to the signal or warning that was given by the engine running from Minneapolis towards St. Paul. There can be no question that if the plaintiff had alighted on the north side of the train and got upon that north platform and waited until after the train passed that he would not have been injured. There is no doubt about that. He

could with safety have got upon the platform and watched until the trains passed through and then taken the customary and usual route across that track, and it is for you to determine whether or not, under all the circumstances of this case, he should have done so, whether he was guilty of contributory negligence in get-
50 ting out on that side and crossing over that route if you believe that that was the customary route known to the company over which passengers went to and fro. *It* is was not the customary route, if it was one over which some passengers went or this man himself that does not make it a customary mode of exit over which passengers were allowed to go and over which they could go without being negligent in so doing. For the mere fact that the plaintiff might have alighted there on several occasions and passed over and then entered the train by crossing that track does not make it a customary route for passengers.

I have been requested by defendant to charge you that the mere fact that the company had provided a platform on both sides of that track for passengers to use in alighting from its trains arriving, and the *the* plaintiff was before and at the time of the accident familiar with the station and its platform, it was his duty to have alighted on said north platform on the night of the accident; and if you believe that by so doing he would not have received any injuries, then the defendant is entitled to a verdict.

I charge you that and state that you must take into consideration the facts as developed here by the evidence and determine whether the route over which the plaintiff went was the usual and customary route for passengers and whether any existing necessity required him to proceed to his home over that track.

It had been shown that there was a way of passing up on the north side of the tracks to some field or highway crossing and then go across there; but then, in order to do that, he would still
51 have to cross the tracks. There was no possible way in which people living on the south side of these tracks could get home without crossing the tracks, unless they went down the stairs and went under the bridge along Victoria street, which was at that time in the condition described to you. So modified in this way the request is given. That is the rule unless there was some existing necessity for the plaintiff alighting on that side and crossing over. If that was the usual mode the company were bound to exercise care and caution in protecting passengers who were going over that track from danger from any engine coming in the opposite direction.

I am also requested to charge you to the effect that these signs in the cars, if you find that they were there, were sufficient notice to the passengers leaving the cars to alight on the north or right-hand side when the cars stopped, and not on the left-hand side. That is true. That is a reasonable regulation, put there, undoubtedly, for the protection of passengers.

If passengers who got out on the north side of the train were protected, and by getting out on the left-hand side it was unsafe and they were liable to get into danger, it was a reasonable regulation,

and unless there was, as in the other case, some justifiable necessity for the plaintiff getting out of that car on the south side it was a reasonable regulation, and if he knew of it—and it was in the car, according to some of the testimony, although he says he didn't know anything about it and he didn't know whether it was there or not—it was a reasonable regulation, and the plaintiff should have obeyed it, and if he disobeyed that reasonable regulation without any existing necessity, and this knowledge was brought home to him, he cannot recover from the company.

52 There are some requests on the part of the plaintiff. Some of them I do not think have any particular application to the facts as they exist in this case. They are abstract propositions of law, but I do not feel like giving them without modifying them as I have modified them in my charge; so I will decline to give the first and second requests except as stated in the charge.

The third request I do not think applies to this case unless you should find that this was the usual and ordinary and customary route for passengers living on the south side of the track and leaving the train at that station to go home, because there is no doubt but that the railroad company is required to exercise the highest degree of care and skill for the protection of passengers on board its trains and while they are boarding and departing from them. There is no question about that. Until a man gets off the train at his station the relation of passenger and common carrier exists.

The fourth request is: The rule requiring a person who is about to cross a railroad track at a public crossing to look up and down the track before passing over is not applicable with all its strictness to a passenger, either boarding or departing from a train, in going to or from a station which the company invites him to use.

In the latter case the passenger has the right to rely upon the duty of the company to keep the ground over which they invite him to pass in going to and from the station absolutely safe, and a person who crosses over a track under such circumstances, for the purpose of boarding or departing from a train, without first looking up and down the track *under*, is not in law guilty of contributory negligence.

53 The law will not say that that mere fact makes him guilty of contributory negligence, but it is a question for the jury to determine under the circumstances of this case whether the plaintiff exercised reasonable and ordinary care and diligence.

That is to say, if that was the customary and ordinary mode of passing over that track, then you are to say whether under all the circumstances of this case did this man exercise all reasonable care and diligence for his own safety.

For it is well known that common instinct and humanity would prevent a man from running right in front of a locomotive engine that was coming down upon him. That is some evidence that he didn't voluntarily go into danger and it is to be taken into consideration by the jury. On the other hand, it is inexcusable folly for a man if he knows or sees and engine is coming down to take chances whether he can get on front of it or not. If he does take these

chances, of course he cannot recover; he is responsible for that and not the railroad company. In this case the disputed questions are whether this was the customary and usual route to get across there and whether the plaintiff exercised the care and caution that was required of him.

As far as the question of the negligence of the plaintiff is concerned I think that what I have given in my charge is all that I care to say about it. This is merely a reiteration of what I have said, and this fifth request I decline to give except as I have stated it in my charge.

If that was the usual and customary mode of egress or ingress from trains at that station for passengers living on the south side of the track or passengers going to and fro, the fact that the plaintiff crossed the tracks in that way could not charge him *per se* with negligence.

54 Whether he was negligent or not would depend upon the circumstances of the particular case.

If you should come to the conclusion in this case that the defendant has to your satisfaction established contributory negligence on the part of the plaintiff, then, whether the defendant was guilty of negligence or not, still the plaintiff cannot recover. For, no matter how negligent the defendant might be, if you should fine that it was guilty of the highest negligence in running that train, still if the plaintiff contributed in any degree to the injury which he suffered at that time he cannot recover and your verdict must be for the defendant.

But if you believe that the company was negligent, and that this negligence is shown by the evidence in this case, and that the company has failed to show by a preponderance of evidence contributory negligence, then the plaintiff would be entitled to a verdict and it would be a question for you to determine what amount of money would compensate him for the injury which he has suffered, what would be a fair renumeration for the injuries he has received. That is all he can recover. Of course he is entitled to recover for loss of time. There is no charge here for medical attendance or anything of that sort. He would be entitled to damages for the injury that he has suffered to his bodily strength and health, if any, and whether that is temporary only or a permanent one it is for you to determine.

If it is temporary you will give such amount as you think would be sufficient compensation for a temporary injury of that character.

55 Pain and suffering is another thing you must take into consideration, though they are difficult to measure by dollars and cents. So if there be a permanent injury it is for the jury to say what amount will compensate him for any permanent injury that the plaintiff has suffered. In all these cases it is left to the sound judgment of the jury to say what amount of compensation under the circumstances of the case the plaintiff is entitled to. You are to consider this case as though it was a litigation arising between two individuals and consider it upon the evidence in the

case and upon the law given you by the court and say whether this plaintiff is entitled to recover anything for an injury which was caused, as he alleges, by the negligence of the defendant company."

The defendant's counsel duly excepted to the following part of said charge:

"And you are to say whether from the evidence in this case that engine was running with care and caution when it was known to the engineer of the transfer engine that the passenger train was there, and that passengers in all probabilities would alight, and that some of them would be likely to alight on that side, for, whatever might be the duty of a passenger and whatever might be his obligation to obey the rules and regulations of the company, passengers, some of them, might disobey those rules that made it his duty to alight on one side of the car in leaving it and might disobey that order and alight on the opposite side. You are to say whether under the testimony this engine was operated and running at a careful rate of speed for the protection of the passengers who might alight on that side."

56 The counsel for the defendant also duly excepted to the following part of the charge of the court:

"The law implies in the contract for the carriage of passengers upon railroads, they being common carriers, that they will not only exercise the highest degree of care for the safe transportation of their passengers, but they will provide safe and convenient modes of ingress and egress for their passengers.

But while this obligation rests upon the common carrier of passengers, there is a reciprocal obligation on the part of the passenger that he will obey all reasonable regulations and rules adopted by the company for the safety of their passengers, either in entering the cars or leaving them, and if the company has built a platform the mere existence of a platform at a station is evidence that it is a point at which the company under that regulation permits passengers to leave or enter the cars. I say that there is a reciprocal obligation on the part of the passenger when he leaves a car or a station to leave it by going upon the platform; but there may be some justifiable necessity or some existing necessity for the passenger leaving it on the opposite side and not obeying what the law says is a reasonable regulation adopted by the company for the safety of the passenger.

In this case the offer is made by the plaintiff to show that there was a necessity for his alighting upon the side opposite to the platform and proceeding across in the direction in which he did when he was struck. It is well known, and I need hardly state it to you, that a railroad company's track over which trains are constantly passing is a place of great danger, and a man who voluntarily and unnec-

57 essarily goes upon that track must expect that he may be injured, and he must exercise great care under every circumstance, but if he is there by necessity no railroad company can be justified in wantonly or wilfully running him down. They must exercise great care and caution for the protection of the person from

any unlawful or criminal act, and if he is lawfully there from necessity they must exercise ordinary and reasonable care for his protection, so I say, unless there is some existing necessity established by the testimony in this case authorizing the plaintiff to alight from that side of the train and cross over those tracks, he cannot recover in this action. He would be guilty of contributory negligence in so doing. Has he shown or does the evidence show that there was any existing necessity in this case for the plaintiff alighting on that side and crossing over?"

The counsel for the defendant also duly excepted to the following part of the said charge:

"I have been requested by the defendant to charge you that the mere fact that the company had provided a platform on both sides of the track for passengers to use in alighting from its trains arriving, and that plaintiff was before and at the time of the accident familiar with the station and its platforms, it was his duty to have alighted on said north platform on the night of the accident, and if you believe that by so doing he would not have received any injuries, then the defendant is entitled to a verdict.

I charge you that and state that you must take into consideration the fact as developed here by the evidence and determine whether
58 the route over which the plaintiff went was the usual and customary route for passengers and whether any existing necessity required him to proceed to his home over that track."

The counsel for the defendant also duly excepted to the following part of said charge:

The court said in its charge, referring to the last-named request on the part of the defendant:

"It has been shown that there was a way of passing upon the north side of the tracks to some field or highway crossing and then go across there, but, then, in order to do that he would still have to cross the tracks. There was no possible was in which people living on the south side of these tracks could get home without crossing the tracks unless they went down the stairs and went under the bridge along Victoria street, which was at that time in the condition as described to you. So modified in this way the request is given. That is the rule unless there was some existing necessity for the plaintiff alighting on that side and crossing over."

The counsel for the defendant also excepted to that part of the charge which was in the following words:

"I am also requested to charge you to the effect that these signs in the cars, if you find that they were there, were sufficient notice t the passengers leaving the cars to alight on the north side or right-hand side when the cars stopped and not on the left-hand side. That is true. That is a reasonable regulation, put there, undoubtedly, for the protection of passengers.

If passengers who got out on the north side of the train were protected and by getting on the left-hand side it was unsafe and they were liable to get into danger, it was a reasonable regulation,

and, unless there was, as in the other case, some justifiable
59 necessity for the plaintiff getting out of that car on the south side, it was a reasonable regulation, and if he knew of it, and it was in the car, according to some of the testimony, although he says *it* didn't know anything about it, and he didn't know whether it was there or not, it was a reasonable regulation, and the plaintiff should have obeyed it, and if he disobeyed that reasonable regulation without any existing necessity and this knowledge was brought home to him, he cannot recover from the company."

The counsel for the defendant also duly excepted to that part of said charge which is in the following words:

"As far as the question of the negligence of the plaintiff is concerned, I think that what I have given in my charge is all that I care to say about it. This is merely a reiteration of what I have said, and this fifth request I decline to give except as I have stated it in my charge.

If that was the usual and customary mode of egress or ingress from trains at that station for passengers living on the south side of the track or passengers going to and fro, the fact that the plaintiff crossed across the tracks in that way could not charge him *per se* with negligence; whether he was negligent or not would depend upon the circumstances of the particular case."

The jury then retired and rendered a verdict in favor of the plaintiff and against the defendant for the sum of eight thousand five hundred dollars.

And because the foregoing matters do not appear of record in said action the judge who tried this action, finding the same to be true and correct, has signed and sealed this bill of exceptions and ordered the same to be made part of the record in this action.

60 Signed and sealed this 23rd day of December, A. D. 1889.

R. R. NELSON. [L. S.]

To M. D. Munn, Esq., attorney for plaintiff.

SIR: Please to take notice that the foregoing is the proposed bill of exceptions on the part of the defendant in the above-entitled action.

Yours, &c.,

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

(Endorsed:) Filed Dec. 23rd, 1889. Oscar B. Hillis, clerk.

61 And afterwards, on the 7th day of January, A. D. 1890, the following proceeding of court was had in words and figures as follows, to wit:

62 United States Circuit Court for the District of Minnesota.

Term Minutes, Dec. Term, A. D. 1889, Jan'y 7th, 1890.

Page 400, "H."

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO.

Defendant's motion to set aside the verdict and judgment entered thereon and for a new trial of this cause having been heretofore fully argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement, now — the court, after due consideration thereof and being fully advised in the premises, it is ordered that said motion for a new trial be, and the same is hereby, granted unless the plaintiff, within thirty days from date hereof, file a written remittitur in the clerk's office of this court, consenting to accept the sum of $5,500.00 in lieu of the verdict and judgment heretofore rendered and entered herein.

63 And afterwards, on the 13th day of January, A. D. 1890, came the plaintiff, by his attorney, and filed the following remitment in the words and figures as follows, to wit:

64 United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The plaintiff, Martin Lowell, in the above-entitled action hereby agrees to and does accept the sum of five thousand five hundred (5,500) dollars as and for the amount of the verdict rendered in said action, and hereby agrees to and does remit all of the verdict above said amount, to wit, the sum of three thousand (3,000) dollars, pursuant to the order of said court made and filed in said action on the 7th day of January, 1890.

Dated this 11th day of January, A. D. 1890.

MARTIN LOWELL,
By M. D. MUNN, J. M. GILMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed Jan'y 13th, 1890. Oscar B. Hillis, clerk.

65 And afterwards, on the 15th day of January, A. D. 1890, the following affidavit of disbursements and notice of taxation of costs was filed in the words and figures as follows, to wit:

66 *Affidavit of Disbursements and Notice of Taxation of Costs.*

United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Statute costs, attorneys' docket fees	$20 00
Marshal's fees, to be taxed	3 00
4 affidavits	1 00
Jury fee	
Clerk's fees, to be taxed	
Witness fees	18 75
Philip Fosberg, eleven days' attendance and 440 miles to and from	38 50
W. C. Merryman, six days' attendance and 2 miles travel	9 20
W. Newberry, six days' attendance, 2 miles travel	9 20
R. Hudson, six days' attendance and 2 miles travel	9 20
Dr. A. B. Ancker, six days' attendance and 2 miles travel	9 20
Dr. E. C. Spencer, six days' attendance and 2 miles travel	9 20
Costs taxed at	$127 25

OSCAR B. HILLIS, *Clerk.*

Jan'y 15th, 1890.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

M. D. Munn, being first duly sworn, doth depose and say that he is the attorney of the plaintiff in the above-entitled cause; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above-entitled proceeding, and that all the items of such disbursements have been actually and necessarily paid or incurred therein by and on behalf of said plaintiff, and that each of said witnesses actually attended court the number of days set forth and testified for the plaintiff in said court and actually traveled the number of miles set out in so doing.

M. D. MUNN.

Subscribed and sworn to before me on this 8th day of Jan., 1890.

N. M. FLIGGESON,
Notary Public, Ramsey County, Minn.

SIR: Please take notice that the costs and disbursements of the plaintiff in the foregoing-entitled action will be taxed by and before Oscar Hillis, clerk of the above-named court, at his office, in the U. S. post-office building at St. Paul, Minnesota, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the

items of costs and disbursements that will then and there be claimed on behalf of said —— and inserted in the judgment in said action.

Very respectfully, M. D. MUNN,
Attorney for Plaintiff.

To Flandrau, Squires & Cutcheon, attorneys for defendants.

67 And afterwards, on the 18th day of January, A. D. 1890, the following writ of error was issued in the words and figures as follows, to wit:

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Martin Lowell, plaintiff, and The Chicago, Milwaukee & St. Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, to command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of January, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

[Seal U. S. Circuit Court, Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

69 [Endorsed:] Ent., D. Law. 615. U. S. Supreme Court. C., M. & St. P. R'y Co., plaintiff in error, *vs.* Martin Lowell, def't in error. Writ of error. Original. Due service admitted Jan'y 18, 1890. M. D. Munn, pl'ff's att'y. Filed Jan'y 18th, 1890. Oscar B. Hillis, clerk.

70 And afterwards, on the same day, the following assignment of errors was filed in the clerk's office in the words and figures following, to wit:

71 United States Circuit Court, District of Minnesota.

MARTIN LOWELL
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Assignments of Errors.

And now comes the above-named defendant, by Flandrau, Squires & Cutcheon, its attorneys, and says—

That in the record and proceedings in the said circuit court in the said above-entitled action, and also in giving judgment in said action, there is manifest error in this, to wit:

First. In overruling the objection of the defendant's counsel to the question put to the plaintiff when testifying in his own behalf as follows: "Have you seen other people get off and on at that station on the south side of the tracks, going to and fro there, about the 17th day of March, 1889, and prior thereto for a short time?" which ruling was excepted to by the defendant's counsel.

There is also error in this: In the court's overruling the objection of the defendant's counsel to the question which was put to the plaintiff when testifying in his own behalf as follows: "Did you ever see anybody who was going over on the south side of the track, off to the south, *to* get off on the north side and go down these steps and under the bridge?" which ruling of the court was excepted to by defendant.

72 There is also error in this: In the court's overruling the objection of the defendant's counsel to the question put to the witness Philip Fosberg, a witness on the part of the plaintiff, who was asked the following question by the counsel for the plaintiff: "About the 17th of March, 1889, and a short time prior to that, had you seen other people get off on the south side?" to which ruling of the court defendant's counsel excepted.

There is also error in this: When the testimony on the part of the plaintiff was closed counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant on the ground that the plaintiff was proven to have been guilty of contributory negligence in leaving the train on the south side in disobedience of the rules and notice of the defendant and in not looking for and seeing the coming engine and avoiding the same. The court refused so to instruct, and the defendant's counsel duly excepted.

There is also error in this: In the court charging the jury as follows: "And you are to say whether, from the evidence in this case, that engine was running with care and caution when it was known to the engineer of the transfer engine that the passenger train was there, and that passengers in all probability would alight, and that some of them would be likely to alight on that side; for whatever might be the duty of a passenger and whatever might be his obli-

gation to obey the rules and regulations of the company, passengers—some of them—might disobey those rules that made it *his* duty to alight on one side of the car in leaving it and might disobey that order and alight on the opposite side. You are to say
73 whether, under the testimony, this engine was operated and running at a careful rate of speed for the protection of passengers who might alight on that side;" which charge was excepted to by the defendant.

The court also erred in this: In charging the jury as follows. "The law implies in the contract for the carriage of passengers upon railroads, they being common carriers, that they will not only exercise the highest degree of care for the safe transportation of their passengers, but they will provide safe and convenient modes of ingress and egress for their passengers. But while this obligation rests upon the common carrier of passengers, there is a reciprocal obligation on the part of the passenger that he will obey all reasonable rules and regulations adopted by the company for the safety of their passengers, either in entering the cars or leaving them; and if the company has built a platform, the mere existance of a platform at a station is evidence that it is a point at which the company under that regulation permits passengers to leave or enter the cars.

I say that there is a reciprocal obligation on the part of the passenger when he leaves a car or a station to leave it by going upon the platform, but there may be some justifiable necessity or some existing necessity for the passenger leaving it on the opposite side and not obeying what the law says is a reasonable regulation adopted by the company for the safety of the passenger. In this case the effort is made by the plaintiff to show that there was a necessity for his alighting upon the side opposite to the platform and proceeding across in the direction in which he did when he was struck. It is well known, and I need hardly state it to you,
74 that a railroad company's track over which trains are constantly passing is a place of great danger, and a man who voluntarily and unnecessarily goe*d* upon that track must expect that he may be injured, and he must exercise great care under every circumstance. But if he is there by necessity no railroad company can be justified in wantonly or wilfully running him down. They must exercise great care and caution for the protection of the person from any unlawful or criminal act, and if he is lawfully there from necessity they must exercise ordinary and reasonable care for his protection. So, I say, unless there is some existing necessity established by the testimony in this case authorizing the plaintiff to alight from that side of the train and cross over those tracks, he cannot recover in this action. He would be guilty of contributory negligence in so doing.

Has he shown or does the evidence show that there was existing necessity in this case for the plaintiff alightin*h* on that side and crossing over?"; to which charge so given defendant's counsel duly excepted.

There is also error in the charge of the court to the jury as fol-

lows: "I have been requested by the defendant to charge you that the mere fact that the company had provided a platform on both sides of that track for passengers to use in alighting from its trains arriving, and that the plaintiff was before and at the time of the accident familiar with the station and its platforms, it was his duty to have alighted on said north platform on the night of the accident, and if you believe that by so doing he would not have received any injuries, then the defendant is entitled to a verdict.

I charge you that, and state that you must take into con-
75 sideration the fact as developed here by the evidence and determine whether the route over which the plaintiff went was the usual and customary route for passengers, and whether any existing necessity required him to proceed to his home over that track;" to which charge the counsel for the defendant duly excepted.

There is also error in the following charge delivered by said court to the jury: "It has been shown that there was a way of passing upon the north side of the tracks to some field or highway crossing and then go across there, but, then, in order to do that he would still have to cross the tracks. There was no possible way in which people living on the south side of these tracks could get home without crossing the tracks unless they went down the stairs and went under the bridge along Victoria street, which was at that time in the condition as described to you; so, modified in this way, the request is given. That is the rule unless there was some existing necessity for the plaintiff alighting on that side and crossing over;" to which charge the counsel for the defendant duly excepted.

There was also error in the court giving the following charge to the jury: "I am also requested to charge you to the effect that these signs in the cars, if you find that they were there, were sufficient notice to the passengers leaving the cars to alight on the north side or right-hand side when the cars stopped, and not on the left-hand side. That is true. That is a reasonable regulation put there undoubtedly for the protection of passengers. If passengers who got out on the north side of the train were protected, and by getting on the left-hand side it was unsafe and they were liable to get into

danger, it was a reasonable regulation, and unless there was,
76 as in the other case, some justifiable necessity for the plaintiff getting out of that car on the south side, it was a reasonable regulation, and if he knew of it and it was in the car, according to some of the testimony, although he says he didn't know anything about it and he didn't know whether it was there or not, it was a reasonable regulation, and the plaintiff should have obeyed it, and if he disobeyed that reasonable regulation without any existing necessity, and this knowledge was brought home to him, he cannot recover from the company;" to which counsel for the defendant duly excepted.

There is also error in this: In the charge delivered to the jury as follows: "As far as the question of the negligence of the plaintiff is concerned I think that what I have given in my charge is all that I care to say about it. This is merely a reiteration of what I have

said, and this fifth request I decline to give except as I have stated it in my charge.

If it was the usual and customary mode of egress or ingress from trains at that station for passengers living on the south side of that track or passengers going to and fro, the fact that the plaintiff crossed -cross the tracks in that way could not charge him *per se* with negligence; whether he was negligent or not would depend upon the circumstances of the particular case;" to which charge counsel for defendant duly excepted.

There was also error in this: The court should have instructed the jury at the close of all the testimony in the *cas* case to find a verdict for the defendant.

And the said defendant prays that the judgment aforesaid so rendered against it in this action for the errors aforesaid and
77 the other many and manifest errors in the said record and proceedings aforesaid may be reversed, cancelled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Defendant.

(Endorsed:) Filed January 18th, 189-. Oscar B. Hillis, clerk.

78 And afterwards, on the same day, the following supercedeas bond was filed in the words and figures as follows, to wit:

79 Know all men by these presents that we, The Chicago, Milwaukee & St. Paul Railway Company, a corporation of the State of Wisconsin, by J. A. Chandler, its agent, and Elias F. Drake and James E. Moore, as sureties, are held and firmly bound unto Martin Lowell in the full sum of ten thousand dollars ($10,000) *dollars*, to be paid to the said Martin Lowell, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of January, A. D. 1890.

Whereas lately, at a general term of the circuit court of the United States for the district of Minnesota, begun and holden at the city of St. Paul, in said district, on the 17th day of June, A. D. 1889, and upon the 27th day of September, A. D. 1889, in said term, in a suit depending in the said circuit court between the aforesaid Martin Lowell, plaintiff, and The Chicago, Milwaukee & St. Paul Railway Company, defendant, judgment was rendered against the said defendant for the sum of five thousand five hundred dollars, and the said Chicago, Milwaukee & St. Paul Railway Company, as such defendant as aforesaid, having obtained a writ of error and filed a copy thereof in the office of the clerk of said circuit court, and a citation directed to said Martin Lowell, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

80 Now, the condition of the above obligation is such that if the said Chicago, Milwaukee & St. Paul Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the obligation to be void; else to remain in full force and vigor.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By J. A. CHANDLER, *Gen. Ag't.* [SEAL.]
ELIAS F. DRAKE, *Sec.* [SEAL.]
JAMES E. MOORE. [SEAL.]

E. D. SEWALL,
J. O. GLANVILLE,
O. D. WHEELER,
EVA POPE,
As to Drake and Moore.

STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

Be it known that on this 16th day of January, A. D. 1890, personally came Elias F. Drake and James E. Moore, the sureties named in the foregoing bond, and, being duly sworn, each for himself did depose and say that he is a resident of and freeholder within the State of Minnesota and is worth the sum of twenty thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

ELIAS F. DRAKE.
JAMES E. MOORE.

Subscribed and sworn to before me this 16th day of January, A. D. 1890.

O. D. WHEELER,
[NOTARIAL SEAL.] *Notary Public, Minnesota.*

(Endorsed:) Filed Jan'y 18th, 1890. Oscar B. Hillis, clerk.

81 The within bond and the sureties thereof are approved by me this 16th day of January, A. D. 1890, and a writ of error allowed in said action.

R. R. NELSON, *Judge.*

82 And afterwards the following citation was issued in the words as follows, to wit:

83 UNITED STATES OF AMERICA, *ss:*

To Martin Lowell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein The Chicago, Milwaukee & St. Paul

Railway Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of January, A. D. 1890.

R. R. NELSON, *Judge.*

84 [Endorsed:] Ent., D. Law. 615. U. S. circuit court, dist. of Minnesota. Martin Lowell *vs.* Chicago, Milwaukee & St. Paul R'y Co. Citation. (Original.) Due service admitted Jan'y 18, 1890. M. D. Munn, pl'ff's att'y. Filed Jan'y 18th, 1890. Oscar B. Hillis, clerk.

85 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 83 pages, numbered consecutively from one to 83, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

U. S. Circuit Court Seal, Dist. of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 28th day of August, A. D. 1890.

OSCAR B. HILLIS, *Clerk,*
By —— ——, *Deputy.*

[Endorsed:] United States circuit court, district of Minnesota, third division. Martin Lowell *vs.* The Chicago, Milwaukee & St. Paul R. R. Co. Return to Supreme Court.

Endorsed on cover: Case No. 14,139. Minnesota C. C. U. S. No. 173. The Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, *vs.* Martin Lowell. Filed September 8, 1890.

Office Supreme Court
FILED.
NOV 11 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 173.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARTIN LOWELL, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES E. FLANDRAU,
Counsel.

1

SUPREME COURT OF THE UNITED STATES.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, 2

Plaintiff in Error,

vs.

MARTIN LOWELL,

Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR. 3

Statement of the Case.

The defendant in this case is a railroad corporation, organized and existing under the laws of the State of Wisconsin, and was on the 17th day of March, 1889, and had been previous to that time operating a railroad in the State of Minnesota, from the city of St. Paul to the city of Minneapolis.

On its said line of railroad within the city of St. Paul, it had a station called Ridgewood Park Station, and had a double track of railroad at that point, and the general course of its tracks at that point was east and west. 4

That trains between said cities going east, or towards the Union Depot, in St. Paul, passed said station on the south track, and trains going west towards Minneapolis passed said station on the north track. There were a great many trains passing there besides the regular scheduled trains, such as freight, transfer and wild trains, which were moving back and forth on said tracks frequently during the day and night. That the space between the two tracks at said station was about nine feet.

That the company had established two depot buildings at that station, one on the south side of the south track, and one on the

5 north side of the north track, which two depot buildings were exactly opposite each other. That it had constructed two safe and commodious platforms for the ingress and egress of passengers to and from its trains, one of said platforms being located on the north side of the north track, and the other on the south side of the south track.

That there was at one place between the two depots a plank walk by which they were communicated, across the intervening tracks.

Immediately east of the east end of these two platforms was a highway, crossing the tracks at right angles, called Victoria street.
6 That said street at this point was below said tracks, the tracks passing over it upon an iron bridge. That at the east end of each of these platforms was a pair of stairs leading down to said Victoria street, designed for passengers alighting upon either of said platforms to descend to Victoria street and pass under said bridge, which supported the railroad tracks, to the other platform, and thus avoid the necessity of crossing said tracks at grade.

That on the said 17th day of March, 1889, Victoria street had not been graded under said tracks, nor lighted, and was not in a very convenient or safe condition for passengers to pass thereon.

That the depot building on the south side of said tracks was
7 used by said defendant company as a ticket office, express and freight offices, and its telegraph operator was located therein. That the depot building on the north side of said tracks was not used for any purpose, and was closed at the time of the alleged accident in this case. But that both said platforms were open and ready for the use of passengers, both day and night, being well lighted after dark.

That the plaintiff had lived in the neighborhood of said station for about six months previous to the 17th day of March, 1889, his place of residence being about 250 feet south of the south track, and about 1000 feet west of the depot. That he was thoroughly
8 familiar with the depots, the tracks and the movement of trains thereon, being in the habit of taking the cars at said depot for St. Paul Union Depot about twice in each week, and returning by the said road.

That on the afternoon of said 17th day of March, 1889, he purchased a round-trip ticket at said Ridgewood Park depot for St. Paul and return, and went to St. Paul, leaving there for his return home at 10 o'clock P. M. of that day, having with him a companion named P. Fosberg. That on the return trip they both rode in the smoking car, which was on the rear end of the train, which was a combination car, divided by a partition in the middle,

the rear half being for baggage and the front half for passengers 9
desiring to smoke

The train was a light one, consisting of an engine, tender, two passenger coaches and this combination car.

That in each end of the smoking car there were posted up notices or signs in large printed letters, which could be plainly seen and read by all passengers in the car, as follows: "*Passengers leaving this car at the forward end will turn to the right, and at the rear end will turn to the left, and avoid danger from trains on the opposite track.*" When the train arrived at Ridgewood Park Station on its way westward, or towards Minneapolis, it stopped at the usual place along-side of the north platform, at ten minutes 10
past ten o'clock P. M. All the passengers destined for Ridgewood Park Station, except the plaintiff and his companion, being two ladies and five or six gentlemen, alighted on the north side of the train and on the north platform. The plaintiff, and his companion Fosberg, got up, passed out of the front door of the smoking car, Fosberg being first, and the plaintiff following. They immediately left the car on the south side and started across the space between the north track and the south track, and also across the south track, towards the south platform. Fosberg being about ten feet in advance of the plaintiff. Fosberg got safely across, but the plaintiff when he reached the south track was struck by an 11
engine coming from the west towards the east, and whatever injuries he sustained arose from being struck by such engine.

No reason or necessity whatever is disclosed by the testimony to explain why the plaintiff alighted on the south side of the train, instead of on the platform on the north side as directed by the company, except the fact that he lived south of the south track, as before stated.

A perusal of the bill of exceptions contained in the Record, from *page 14 to page 28*, is as good a statement of the case as can be given.

The questions involved in this case are whether the defendant 12
company was guilty of negligence in running its engine through the Ridgewood Park Station on the south track when passengers were being debarked from a train on the north track. And second, whether the plaintiff was guilty of contributory negligence in alighting from the train on the south side, instead of on the platform provided by the company for that purpose on the north side of the track, and also in attempting to cross the tracks without looking to the westward to ascertain whether a train was approaching from that direction.

13

Specification of Errors Relied Upon.

The plaintiff in error relies upon the following errors which appear upon the record in said case, to-wit:

1. The court erred in overruling the objection of the defendant's counsel to the question put to the plaintiff, when testifying in his own behalf, as follows:

"Question. Have you seen other people get off and on at that station on the south side of the tracks, going to and fro there, about the 17th day of March, 1889, and prior thereto for a short time?"

14 Which question and the ruling and exception thereto is found upon the Record, at page 18, at folio 42.

2. The court erred in overruling the objection of defendant's counsel to the question which was put to the plaintiff when testifying in his own behalf, as follows:

"Q. Did you ever see anybody who was going over to the south side of the tracks—off to the south—get off on the north side and go down these steps and under the bridge?"

Which question with the ruling of the court and exception thereto will be found on *page 18, folio 42, of the Record.*

3. The court erred in overruling the objection of defendant's
15 counsel to the question put to the witness Philip Fosberg, as follows:

"Q. About the 17th day of March, 1889, and a short time prior to that, had you seen other people get off on the south side?"

Which question with the ruling of the court and exception thereto will be found on *page 19, folio 42, of the Record.*

4. The court erred in not granting the defendant's motion to instruct the jury to find a verdict for the defendant at the close of the plaintiff's testimony, on the ground that the plaintiff was proven to have been guilty of contributory negligence in leaving the train on the south side in disobedience to the rules and notices of the
16 defendant, and in not looking for and seeing the coming engine and avoiding the same.

Which motion and ruling and exception is found upon *page 19, folios 42 and 43, of the Record.*

5. The court erred in charging the jury as follows:

"You are to say whether, from the evidence in this case, that engine was running with care and caution when it was known to the engineer of the transfer engine that the passenger train was there, and that passengers would in all probability alight, and and that some of them would be likely to alight on that side; for whatever might be the duty of the passenger and whatever might

be his obligation to obey the rules and regulations of the company, passengers, some of them, might disobey those rules that made it his duty to alight on one side of the car in leaving it, and might disobey that order and alight on the opposite side. You are to say whether, under the testimony, this engine was operated and running at a careful rate of speed for the protection of the passenger who might alight on that side." 17

Which charge is found upon *page 20, in folio 45, of the Record, and the exception thereto, in folios 72–73.*

6. The court erred in charging the jury as follows:

"The law implies in the contract for the carriage of passengers upon railroads, they being common carriers, that they will not only exercise the highest degree of care for the safe transportation of their passengers, but they will provide safe and convenient modes of ingress and egress for their passengers. 18

"But while this obligation rests upon the common carrier of passengers, there is a reciprocal obligation on the part of the passenger that he will obey all reasonable rules and regulations adopted by the company for the safety of their passengers, either in entering the cars or in leaving them; and if the company has built a platform, the mere existence of a platform at a station is evidence that it is a point at which the company under that regulation permits passengers to leave or enter the cars. I say that there is a reciprocal obligation on the part of the passenger when he leaves the car or station to leave it by going upon that platform. But there may be some justifiable necessity or some existing necessity for the passengers leaving it on the opposite side and not obeying what the law says is a reasonable regulation adopted by the company for the safety of the passenger. 19

"In this case the effort is made by the plaintiff to show that there was a necessity for his alighting on the side opposite to the platform and proceeding across in the direction in which he did when he was struck. It is well known and I need hardly state to you, that a railroad company's track over which trains are constantly passing is a place of great danger, and a man who voluntarily and unnecessarily goes upon that track must expect that he may be injured, and he must exercise great care under every circumstance; but if he is there by necessity no railroad company can be justified in wantonly or wilfully running him down. They must exercise great care and caution for the protection of the person from any unlawful or criminal act, and if he is lawfully there from necessity they must exercise ordinary and reasonable care for his protection. So I say, unless there is some existing necessity established by the testimony in this case author- 20

21 izing the plaintiff to alight from that side of the train and cross over those tracks, he cannot recover in this action. He would be guilty of contributory negligence in so doing. Has he shown or does the evidence show that there was any existing necessity in this case for the plaintiff alighting on that side and crossing over."

Which charge is found upon *pages 21 and 22, at folios 47 and 48, of the Record, and the exception thereto at folios 73–74.*

7. The court erred in charging the jury as follows:

"I have been requested by the defendant to charge you that the mere fact that the company had provided a platform on both
22 sides of that track for passengers to use in alighting from its trains ariving, and the plaintiff was before and at the time of the accident familiar with the station and its platform, it was his duty to have alighted on said north platform on the night of the accident; and if you believe that by so doing he would not have received any injuries, then the defendant is entitled to a verdict.

"I charge you that and state that you must take into consideration the facts as developed here by the evidence and determine whether the route over which the plaintiff went was the usual and customary route for passengers, and whether any existing necessity required him to proceed to his home over that track."

23 Which charge is found upon *page 23, folio 50, of the Record, and the exception thereto at folio 74.*

8. The court erred in charging the jury as follows:

"It has been shown that there was a way of passing up on the north side of the tracks to some field or highway crossing and then go across there; but then, in order to do that, he would still have to cross the tracks. There was no possible way in which people living on the south side of these tracks could get home without crossing the tracks, unless they went down stairs and went under the bridge along Victoria street, which was at that time in the condition described to you. So modified in this way the request
24 is given. That is the rule unless there was some existing necessity for the plaintiff alighting on that side and crossing over."

Which charge is found upon *page 23, at folios 50 and 51, of the Record, and the exception thereto at folio 75.*

9. The court erred in charging the jury as follows:

"I am also requested to charge you to the effect that these signs in the cars, if you find that they were there, were sufficient notice to the passengers leaving the cars to alight on the north or right hand side when the cars stopped, and not on the left hand side. That is true. That is a reasonable regulation, put there, undoubtedly, for the protection of passengers.

"If passengers who got out on the north side of the train were 25
protected, and by getting out on the left hand side it was unsafe and they were liable to get into danger, it was a reasonable regulation, and unless there was, as in the other case, some justifiable necessity for the plaintiff getting out of that car on the south side, it was a reasonable regulation, and if he knew of it—and it was in the car, according to some of the testimony, although he says he didn't know anything about it and he didn't know whether it was there or not—it was a reasonable regulation and the plaintiff should have obeyed it, and if he disobeyed that reasonable regulation without any existing necessity, and this knowledge was brought home to him, he cannot recover from the company." 26

Which charge is found upon *pages 23 and 24, at folio 51, of the Record, and the exception thereto at folios 75–76.*

10. The court erred in charging the jury as follows:

"As far as the question of the negligence of the plaintiff is concerned, I think that what I have given in my charge is all that I care to say about it. This is merely a reiteration of what I have said, and this fifth request I decline to give except as I have stated it in my charge.

"If that was the usual and customary mode of egress or ingress from trains at that station for passengers living on the south side of the track or passengers going to and fro, the fact that the 27
plaintiff crossed the tracks in that way would not charge him *per se* with negligence.

"Whether he was negligent or not would depend upon the circumstances of the particular case."

Which charge is found upon *page 25 of the Record, at folio 53, and the exception thereto at folio 76.*

11. The court erred in not instructing the jury to find a verdict for the defendant.

28

29

ARGUMENT.

This case seems to me to present very few and very simple questions for the consideration of the court.

The plaintiff was a man who was thoroughly familiar with the whole situation of the defendant's station at Ridgewood Park, composed of its two depots, one on each side of the north and south tracks and each supplied with an ample, commodious and well lighted platform, erected for the purpose of passengers embarking upon and debarking from defendant's trains. He lived within about 1,000 feet of this depot, and had lived there for
30 about six months, and had been in the habit of taking trains at this station as often as twice a week during that time, for St. Paul and return, so that there could be no question whatever about plaintiff's entire familiarity with the whole situation at the station, and it is so stated in the bill of exceptions. *Page 16, folio 37.*

When he arrived at Ridgewood Park Station, at ten minutes past ten on the evening of the 17th day of March, 1889, he knew perfectly well that if he got out of the train as he was directed by the sign conspicuously posted in the car in which he rode, on the north side, that he could not be hurt. The very fact that the platform was there was sufficient indication to him that there was
31 the place for him to alight. The court concedes this state of things in his charge to the jury. He says, *on page 22, folio 49, of the Record*, "there can be no question that if the plaintiff had alighted on the north side of the train, and got upon that north platform and waited until after the train passed, that he would not have been injured. There is no doubt about that. He could with safety have got upon the platform and watched until the train passed through and then taken the customary and usual route across the track."

There can be no doubt in the law that that was his duty, and there can be no excuse for his violating it, excepting the existence
32 of some paramount necessity which prevented him from alighting in the manner pointed out by the company, upon the north platform.

There was no evidence in the case that any such necessity existed; the only possible excuse that plaintiff had for violating the rules of the company and getting off on the wrong side was the fact that he resided south of the south track. This fact appears in the bill of exceptions upon *page 19, folio 43, in these words:* "The evidence on the part of defendant was then introduced. There was no evidence in the case, from either side, showing or tending to show that any reason or cause existed for

the plaintiff leaving the cars on the south side, instead of the 33
north side, except as above set out."

Let us examine briefly whether the fact of the plaintiff's residing on the south side of the south track created any necessity for his getting off on the south side of the train, instead of upon the north side, and upon the platform constructed for the reception of passengers. In the first place it was necessarily more inconvenient for him to alight from the cars onto the ground between the two tracks than it would have been for him to have stepped off upon the passenger platform on the north side. In the next place his alighting upon the south side could not have saved him more than a minute or a minute and a half of time in going across 34
the tracks, if in fact it would have saved him any time. It is inconceivable that any reasonable necessity could have existed to justify his violation of the rules of the company. Now, the court all the way through its charge instructs the jury that it is their duty to find a verdict for the defendant by reason of the violation of the reasonable rules of the defendant by the plaintiff in alighting on the south side, unless there was some prevailing necessity which justified him in so doing. The court does not even intimate what that necessity consisted of, and there was no testimony, as the bill of exceptions says, that any such necessity existed, except that he resided on the south side of the track. The court reiterates 35
this point to the jury in every instance in which we have excepted to his charge, and it was for that very reason that our exceptions were taken to those parts of the charge which authorized the jury to consider and decide whether any such necessity existed, when there was no evidence in the case which would justify a jury in finding the existence of any such necessity, and clearly the jury would not be permitted to find, nor the court to submit to them, the question of the existence of such a necessity when there was no evidence in the case tending to prove anything of the kind.

Now, we claim this: that no necessity could exist or arise that would justify the plaintiff in violating the rules of the company as 36
he did, and subjecting himself to the danger which he did, unless that necessity was created by the defendant company. Certainly the convenience of the plaintiff could not give rise to any such necessity. Certainly the interests or the profit of the plaintiff could not give rise to any such necessity which would be binding upon the defendant and release the plaintiff from his obligation to obey the reasonable laws of the company, made for his safety.

Suppose the plaintiff had heard that his dwelling house was being assaulted by bandits or Indians. That certainly would create a very trying necessity for the plaintiff, and would justify

37 him in gaining all the time he could in arriving at his home, but as the defendant would not be chargeable in any way with the creation or existence of such an emergency, if the plaintiff wanted to take advantage of it he would have to do so at his own risk, because it would be solely for his own benefit and protection.

Suppose that when the train arrived at the railroad station the plaintiff had seen that his house was on fire and his family in danger. This certainly would have been good ground for his hurrying to reach his home, but, unless it had turned out that the defendant company had set his house on fire, we can not conceive how he could have violated the regulations of the company in leaving the
38 train on the wrong side except at his own risk. The rule laid down by the judge in his charge to the jury on the question of the existence of some necessity that might justify the plaintiff in leaving the cars on the wrong side, amounts to this, nothing more and nothing less: that the jury might find that the company's regulations and rules of departure from the trains were obligatory on everybody who lived on the north side of the track, but imposed no obligations or duties upon passengers residing on the south side of the tracks. This, of course cannot be the law, and the court clearly erred in so instructing the jury.

I can conceive of the existence of no necessity which would
39 justify the plaintiff in acting as he did, except, perhaps, where the defendant had put up a sign in the cars or on the platform forbidding passengers to alight thereon on account of its condition, or for some other similar reason. Then I think that such a necessity would have arisen as would have justified the plaintiff in taking the course he did, but certainly nothing short of a necessity created by the defendant could justify him in so doing.

It is hardly necessary to enter separately in detail upon an argument or discussion of each of the six exceptions that we take to the charge of the court on this particular point, because what is said of one exception is applicable to them all, the court having
40 reiterated five or six times to the jury that they must find for the defendant unless they found that some paramount necessity existed which authorized the plaintiff to violate the rules of the company as he did. The record shows that the plaintiff could read English. He swore he had never seen the sign, *folio 38*, but that cuts no figure in the case. This is an English speaking country, and signs of warning are not required to be in any other tongue. If it were otherwise they would have to be displayed in all languages. Such is not the law. If passengers don't read them, or won't read them, the responsibility is upon themselves, and not upon the company. Its duty is performed in posting them conspicuously in the language

of the country, but this notice was not intended to enlighten the 41
plaintiff. He knew all about it without the aid of the notice. The notice was only for such passengers as were unfamiliar with the situation of the platforms and stations.

That the court was correct in its charge to the jury that the plaintiff could not recover, having violated the reasonable rules of the defendant and alighted from the cars in a manner prohibited by the defendant, had he not qualified it, there can be no doubt, and we call your Honors' attention to the following cases establishing the law on that point.

In Bancroft v. R. R. Co., 97 Mass. 275, the plaintiff 's intestate took a way of crossing a track which was dangerous, when the 42
company had furnished a safe way. He was not allowed to recover.

In Forsyth v. R. R. Co., 103 Mass. 510, the plaintiff alighted from the cars at night at defendant's station at one of the two platforms extending along on each side of the tracks to a highway, which plaintiff knew crossed the railroad. That instead of walking along the platform he voluntarily stepped from it with the intention of going obliquely across the track to the highway, and when he stepped off the platform he fell into a cattle-guard and was injured. It was held that he could not recover, and the reason was that if he had stayed upon the platform constructed by the 43
company for his safety, and not attempted to make a short cut, he would not have been injured.

In Gonzales v. R. R. Co., 38 N. Y. 440, the court, at *page 444*, in its opinion, gives the gist of this case in these words: "It seems to me very clear how the casulty occured. The car in which the defendant was riding had reached the crossing of the street where he lived. To get off there saved him a few steps of distance and a few moments of time, and, forgetful of the danger of the express train, of which a minute's reflection would have reminded him, without so much as looking up the track to see if the express train was coming. * * * * Had he kept his seat until the train 44
in which he was seated had stopped to discharge its passengers, or in default of that had he looked up the track before stepping down from the platform of the car, either precaution would have saved his life."

This case is very much in point with the case at bar. The plaintiff there chose an unsafe method of debarking from the train to save a little distance and a few moments time, and was injured in consequence; it is almost precisely what the plaintiff did in the case at bar.

45 *Zeebe v. R. R. Co., 33 Pa. St. 318:* The syllabus of this case is as follows: "A railroad company that has provided a sufficient platform for the egress of passengers from their cars is not liable for injuries to a passenger, sustained in consequence of his voluntarily leaving them on the opposite side, and stepping on the other track instead of on the platform.

"If the passenger be injured in consequence of his disregard of the necessary regulation of the company in regard to the mode of alighting from the cars, they are not liable, even though the negligence of their servants concurred in causing the mischief."

This case is exactly in point with the case at bar, and the opinion
46 of the court abundantly supports the syllabus.

In Sullivan v. R. R. Co., 20 Pa. St. 234, in the opinion of Justice Woodward, on *page 238*, he says: "On the part of the passenger his consent is implied to all the company's reasonable rules and regulations for entering, occupying and *leaving* the cars; and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business, the companies are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief."

In R. R. Co. v. Ricketts, (Ky.) 19 S. W. Rep. 182, which case is also found in a note on *page 297 of Vol. 52, Am. & Eng. R. R. Cases.*
47 it is held:

Extract from the opinion of the court:

"Here the company's platform was on the left hand side of the track, and it was safe and commodious, and well lighted, and the appellee by the use of ordinary prudence could have left the cars and depot grounds with reasonable safety, had he taken the platform side, but he preferred to leave the cars by the right hand side of the track, where there was no platform and no light, and the company not being bound to erect a platform on that side and keep it lighted in the night time, having erected a safe and commodious platform on the other side, which was well lighted, his
48 thus leaving the cars was at his own risk and peril. His having theretofore entered and left the cars by the right-hand side, and others having done the same thing, cannot have the effect, under the circumstances of this case, to make it the duty of the company to have that side lighted, etc., because the appellee knew and could see that the left hand side was a safe and commodious way, and designated by the company for the passengers to leave the cars, and not the right hand side. Hence he took the right hand side at his peril."

Pastoris v. R. R. Co., (Pa.) 24 Atl. Rep. 283., also found in a note on *page 297, of Vol. 52, Am. & Eng. R. R. Cases.* In this

case it was held: That where a passenger somewhat intoxicated 49
leaves a train in the night time at a station with which he is acquainted, on the side of the track on which there is no platform, and falls off the bridge on which the train was standing and is killed, there can be no recovery for his death.

If anything could excuse a person for doing such a foolish thing as the plaintiff did in the case at bar, it would be that he was drunk, but when he does it in the full possession of his faculties, and with full knowledge of the situation in and about the station there can be no possible excuse for his conduct, and he takes the whole risk of his actions upon himself.

In Connolly v. R. R. Co., (*Mass.*) *32 N. E. Rep. 937*, the 50
plaintiff got off on the wrong side of the track and was run down. It was held that he could not recover.

I think it would be useless to multiply cases on a point so well understood and settled as this one seems to be and especially so when the court below fully agreed with us in the position we take.

But the plaintiff attempted to justify his conduct in getting off on the wrong side of the train, by the fact that he had done so on previous occasions, and also that other people had done the same thing. There is nothing more shallow and illogical than the attempt to justify the commission of a wrong by showing that the party committing in had been in the habit of so doing, and that 51
others joined him in the same misconduct.

It was, therefore, improper, under the circumstances of this case, where the existence of the platforms and the permanent and conspicuous publication of the company's rules, indicated where passengers should alight, to allow any proof on that subject; but the court did allow the following question to be asked the plaintiff in his examination in chief:

"Q. Have you seen other people get off and on at that station on the south side of the tracks, going to and fro, about the 17th day of March, 1889, and prior thereto for a short time." *Record, page 18, folio 42.* 52

And also the following question:

"Q. Did you ever see anybody who was going over on the south side of the tracks, off to the south, get off on the north side, and go down these steps and under the bridge." *Record, pages 18–19, folio 42.*

And also the question that was put to the witness Philip Fosberg, as follows:

"Q. About the 17th day of March, 1889, and a short time prior to that, had you seen other people get off and on the south side." *Record, page 19, folio 42.*

53 The mere fact that the plaintiff may have entered or alighted from the cars on the south side, instead of upon the platform, and that he may have seen some others do the same thing cannot be construed in any way to be a license or a consent on the part of the defendant for the plaintiff to repeat the act at its expense.

In the case of *Wheelwright v. Railroad Company, 135 Mass. 225*, the court said (*at page 229*), speaking of the plaintiff:

"She was attempting to cross at a place not designed or adapted for crossing, at which the defendant had held out no invitation or inducement for her to cross. The most that can be contended on the evidence is that the defendant had tolerated a
54 practice that the plaintiff and others had adopted of crossing, where she was attempting to cross, without taking any active measures to prevent it. This is far from an inducement or invitation for the defendant to cross there."

The very fact of the existence of the platform on the north side of the track and the notice published in the cars as to the proper side on which to debark is a standing refutation of the company's having invited, induced or consented to any other method of egress from the cars, and no amount of testimony could justify the finding of a license from the company to leave the cars in any other way, except a practice adopted by the whole travelling
55 public, which had continued for such a length of time as to force notice upon the company and make it necessary for them either to prohibit it, or be charged with its recognition. In this case there is no pretence that it ever was done, except by the plaintiff himself and a few others on some very sporadic occasions, yet the court left it to the jury to find whether or not the way the plaintiff left the cars was the usual and customary route for passengers. *Record, page 23, folio 50*, 3d exception to charge.

The counsel for the defendant in error may, and probably will, say that we are not entitled to the benefits of our exceptions to these questions, because previous to their being asked, and our
56 taking objections and exceptions to the same, the following testimony was admitted without objection, which is found on *page 18, folio 41, of the Record.*

Question to the plaintiff: "Q. As you go in and out of this station on which side were you in the habit of going off the cars? A. On the south side. Q. On the same side you got off this night? A. Yes, sir. Q. Have you seen other people get on and off that way? A. Yes, sir. Q. Did anyone ever object to your doing that. Did anyone ever tell you not to do that? A. No."

The mere fact that the plaintiff was allowed to testify to that extent without objection certainly could not justify the admission

of further testimony of the same kind by himself and other witnesses, if properly objected and excepted to by defendant. 57

3. The plaintiff was clearly guilty of contributory negligence, even if he had not been at fault in alighting on the south side of the train, because when he got upon the space between the two tracks, before he attempted to cross the south track, it was his duty to exercise all his functions of seeing and hearing to ascertain whether it was safe for him so to do.

The bill of exceptions, on *page 18, folio 41*, shows that "there was an unobstructed view upon the tracks to the west from any point at the Ridgewood Park depot of at least 1,500 feet, and a train approaching could be seen that distance." Therefore had 58 the plaintiff taken the trouble to look westward when he alighted from the train before going upon the south track, he would necessarily have seen the train that injured him coming. Other people saw it, Fosberg saw it and called out "Look out Martin," *page 17, folio 40*, and the conductor of the passenger train, after seeing his passengers off the train on the north platform, and after giving the signal to his engineer to go ahead, having got upon the platform of one of the coaches, saw the plaintiff and Fosberg going in the direction of the approaching engine and called to them as loud as he could to look out for themselves. *See page 18, folio 41 of the Record.* Several witnesses swore that the train 59 which struck plaintiff had a headlight burning at both ends, *folio 39, page 17*, and several witnesses swore that the engine whistled for the station about a quarter of a mile before reaching it, and that its bell was rung all the way from where it whistled to the station, *folio 40, page 17*. Other witnesses swore that they did not see or hear these things.

The train was evidently right close to the plaintiff when the plaintiff stepped upon the south track, because he was immediately struck by it, and there can be no reason why he did not see it and avoid it, except that Fosberg, his companion, had just got across in time to save himself, about ten feet ahead of him, and he was in 60 a great hurry to catch up with him; there is no other explanation of his reckless conduct.

It is not necessary for me to introduce authorities to satisfy this court upon the point that a man must exercise prudence and care before going upon a railroad track. I will, however, call your Honors' attention to the case of *Schofield v. R. R. Co., 114 U. S. 615*, which case I argued myself in this court, in 1885, and in which this same railroad company was the defendant in error. In that case the whole doctrine is established by this court that a person cannot enter upon a railroad track without exercising care and prudence

61 commensurate with the dangers presented thereby. It is true that the accident in that case occurred at a highway crossing, but the principle involved is substantially the same.

The counsel for the defendant in error may, and probably will, invoke in answer to our reasoning upon this point the rule of the defendant company which was introduced in evidence on the trial, which is found upon *page 18 of the Record, at folio 40, and is as follows:* "When a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite each other, and proceed slowly until trains are passed." It nowhere appears in the case that the plaintiff
62 when he attempted to cross the defendant's tracks at the time of the accident knew anything about the existence of such rules, but whether he did or not makes no difference in what the law demanded of him in the exercise of care and prudence.

In the case of *Chaffee vs. R. R. Co. 17 R. I. 658, 652 Am. & Eng. R. R. Cases, 366,*) the court held as follows: "Although a passenger about to board an outgoing train at a station is acquainted with a rule of the company providing that when a train is standing at a station an approaching train shall stop and allow such standing train to clear the station before proceeding, and relies upon the observance of such rule by the company's employees, this does not
63 absolve him from the duty of exercising ordinary care for his own protection in crossing the tracks at the station."

This case is clearly in accordance with reason and law, and covers exactly the point which I am discussing. It cannot be said legally or logically that a person about to take a train or leave a train at a station, even if he knows of the existence of rules which have been formulated by the company for his protection, can abandon all care of himself, and, relying upon such rules, recklessly run into danger and then hold the company responsible for his injuries. The law imposes mutual obligations upon the company to do its best to protect its patrons, and upon the latter to do
64 their best to protect themselves. And no matter how negligent the company may be, if the passenger is negligent in any degree that contributes to his injuries, he is precluded from a recovery.

It seems very clear to me that the judgment in this action should be reversed.

CHAS. E. FLANDRAU,
Attorney for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 173.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,

vs.

MARTIN LOWELL,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. K. DAVIS,
M. D. MUNN,
Counsel for Defendant in Error.

ST. PAUL, MINN.
DISPATCH JOB PRINTING COMPANY.
1893.

Supreme Court of the United States.

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

There are only two questions in this case, to-wit:

(1) Was the plaintiff in error negligent at the time and place mentioned in the bill of exceptions?

(2) Was the defendant in error guilty of contributory negligence?

I.

The bill of exceptions discloses on the first question the following facts: That at the place where defendant in error was injured there is a station owned and maintained by plaintiff in error, where it received

and discharged its passengers, there being double tracks passing by the same on the north side; that in going to and from the station passengers who either boarded or departed from west-going trains were obliged to cross the south-lying of those tracks, this station being within the city limits of the City of St. Paul. On the night in question, it being very dark, plaintiff in error stopped its passenger train opposite said station on the north-lying of said tracks, and defendant in error, who was a passenger on the train, left the same to go to the station, and thence to his home. As he was in the act of crossing said south track, plaintiff in error ran a "wild train," consisting of an engine and tender over the same in front of and past said station. This wild train was run at about twenty (20) miles an hour backwards, and without a headlight on the approaching end, and no warning was given of its approach, either by the ringing of a bell or the sounding of a whistle. Defendant in error was struck by this train as he was crossing the south-lying track on his way to the station, and thrown about thirty (30) feet.

The passenger train upon which the defendant in error had been riding was a regular scheduled train, and reached the station on time. As it stopped at the station to discharge its passengers it could have been seen by the engineer of the wild train when his engine was a quarter of a mile distant. A rule of the plaintiff in error, in force at the time, required the engineer of the wild train to stop his engine opposite the passenger train standing at the station. This he did not in any way attempt to do, although he saw the passenger train as it came into Ridgewood station, and knew that it stopped for the purpose of re-

ceiving and discharging passengers at that point, and that passangers were likely to pass over the south lying track in going to and from the station.

We do not understand that plaintiff in error seriously contends that these facts do not disclose negligence on its part. Should such a contention be made, we beg to call the attention of the Court to the following cases:

Hurbert vs. *N. Y. C. R. R. Co.*, 40 N. Y., 151, wherein the Court say: "Within the limits in which persons necessarily and ordinarily go to and from trains, it is necessary that the company keep the ground safe."

In *Terry* vs. *Jewett*, as receiver, 78 N. Y., 338-342, wherein the Court say: "It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive or discharge passengers. Any other system would be dangerous to human life." For the same principle, see also:

Brasil vs. *N. Y. Co.*, 84 N. Y., 241;
Gaynor vs. *O. C. & N. Ry.*, 100 Mass., 208;
B. & O. Ry. Co. vs. *Hauer*, 12 Am. & Eng. R. R. Cases, 152; S. C., 60 Md., 449.
Klein vs. *Jewett*, 26 N. J. Eq., 474;
Parsons vs. *Ry. Co.*, 113 N. Y., 355;
Swift vs. *Ry.*, 123 N. Y., 646.

II.

On the second question, the bill of exceptions discloses the following facts:

That on the evening in question the defendant in error was a passenger on the regular passenger train of

plaintiff in error, and rode in the rear car of the train to his destination at said Ridgewood Park station; that said train was run like all west-going trains of plaintiff in error on the north-lying track. That defendant in error lived on the south side of the tracks, about a quarter of a mile from said station, and in order to reach his home it was necessary to cross the south-lying track to the station, and thence proceed down a flight of steps to the pathway, there being no other way of reaching his home, unless he passed down through a ravine called Victoria street. This ravine could be reached from the north side of the tracks by a flight of steps which did not reach within two feet of the ground, and it was then necessary to step therefrom into, and wade down through, a stream of water varying in depth from four inches to two feet in order to reach the south side of the tracks. There were no lights along this passage way. That prior to the accident it was customary for all passengers living south of the station to cross the south track, and in so doing to step from the platform of the car down steps on the south side of the same, thence across the south track to the station, as defendant in error did on the night in question, all of which was well known to the plaintiff in error. At the east end of said station, the point where the rear end of the train going west was stopped, there was planking between the tracks. That as soon as the train stopped at the station, defendant in error immediately arose from his seat, and walked out on to the platform of the car, and down the steps on the south side of the same, as he had always done before, for the purpose of crossing over to the station on the south side and thence to his home.

The conductor of the train was standing on the platform of the car on the north side of the door, and saw him go out and start down the steps on the south side, and raised no objection. As he came out on the platform of the car the train began to move away, and it was necessary for him to leave the car hurriedly. When he stepped down to the ground he was in such a position that he faced the west up the south-lying track, the direction from which a train on that track would come, but he saw no train or engine coming, and knew that no train was due there at that time. As soon as he stepped from the car he started for the station, and before reaching the same was struck by this wild train, consisting of an engine and tender, in the manner as hereinbefore stated. The only light burning at this time on the south side was one kerosene lamp near the station. That the station on the south side was the only one ever used by plaintiff in error, and the one in which it received all its passengers at that place; sold all its tickets; checked all baggage; in fact, transacted all its business, the place on the north side, called a station, never having been used in any way. All of the foregoing is contained in the bill of exceptions found on pages 14 to 18 of printed record, and so tersely stated that we deem it unnecessary to refer to the same by folios.

Counsel for plaintiff in error, in his argument, discusses two questions in connection with this point: First, That it was the duty of the defendant in error to have gotten off on the north side, and walk down the steps and through this ravine called Victoria Street. It seems hardly necessary to say that a passenger cannot be expected to wade through a stream

of water varying in depth up to two feet, the banks of which are composed of marsh and mud running over an uneven surface, where there are no lights, and especially when this passage way has never been used by any person, and the railway company has never shown any indication that it was its intention to have passengers use it by furnishing a safe means of reaching it.

Second. The second point which counsel for plaintiff in error discusses is the sign which was placed in the end of the car directing passengers leaving the car at the front end to turn to the right. Defendant in error never saw this sign, and did not know of its existence. All of his observations had been to the contrary. All persons that he had seen going to and from the cars at Ridgewood station had boarded and departed on the south side. The officials in charge of the train and station had permitted this, raised no objection thereto, and, therefore, his knowledge upon this subject being confined to his observations, and the custom of the company as to the side upon which passengers boarded the train and departed therefrom, he had a right to rely thereon and act as he did. His getting off on the south side of the car and starting directly across to the station, the only place where he could go in order to reach his home, was not the proximate cause of nor does it conclusively appear that this contributed in any way to his injury. He either had to step down on that side of the car and walk across, or step down on the north side and walk around the end of the car and then across. When he stepped out on the platform, the conductor was standing in the passageway which led down to the north side, the train had begun to move away and it was

necessary for him to leave it immediately, and he took the open and customary course, the one which he had always taken, and which he had always seen others take. This case is readily distinguishable from all of the cases cited by plaintiff in error in this, that all passengers here were obliged to cross this south-lying track in order to reach the station. It was not a question of convenience to the passengers, it was a question of necessity in getting to and from the only place provided by the company for its passengers, and for this defendant in error in reaching his home. Further, he did what was not necessarily required of him, he looked in the direction from which a train might come, not because he expected one would come, but because the position he was placed in was such that he could look in that direction, and he saw no train coming, nor did he hear any warning of the approach of a train. The point where he left the train was at the eastern end of the station or platform, a point where there was planking put between the tracks for people to cross on in going to and from the station. Counsel for plaintiff in error says that he could see no necessity for his getting off on the south side. Aside from the necessity of his immediately leaving the train under the circumstances of this case, with the officer in charge of the train occupying the north passageway, there is no necessity for his having left on the south side other than such a necessity as exists in all cases for passengers to go to and from the station, and to and from their homes, over the way which the company invites them to go, in fact the only way provided by the company for them to go. It seems strange indeed that it should be contended that a person in leaving a passenger train at a regular sta-

tion should be obliged to stop and ask himself "Is it safe for me to pass over the only way provided by the company for me to go?" when such a way is the one which he and all others had continually used in reaching the station.

We desire to call the attention of the Court on this question to several authorities which are directly applicable.

Parsons vs. *N. Y. C. & H. R. R. R. Co.*, 113 N. Y., 355, is a case where the deceased was a passenger on a train going in a northerly direction, and which he left at a station called Exchange street in the city of Buffalo, starting to cross the tracks intervening between the point he desired to reach and the train he had left, not for the purpose of reaching the station, which was on the south side. The deceased had frequently done this before. The Court in substance say: The duty of active vigilance required of persons going upon railroad tracks must be adapted to the circumstances of the case, and when the company by its conduct and its published regulations has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have a right to rely upon this assurance, and are not necessarily guilty of negligence when injured by trains while doing so. The deceased while walking upon the track in this case was necessarily looking in the direction from which the freight train was approaching, but no positive proof was given that he looked towards it immediately before he was struck, and it is not probable that he could have seen it if he had looked when he first alighted. The freight train was probably running at the rate of forty feet a second, and when the deceased first alighted it was probably beyond the line of his vision.

We are of the opinion that the case was in all of its aspects one for the jury. It cannot properly be said, we think, of a passenger who leaves a train for the purpose of going to and from a station, that he loses the right to be protected by the regulations which the company has provided for the safety of persons traveling on its cars, and using its station grounds. He may not stand upon the track or go thereon without using the care and caution required of prudent persons under the circumstances of the case, but if a person under such circumstances is injured by the omission of the servants of the company to obey the rules adopted for the protection of persons in that situation, we think the company becomes liable for injuries thus received. The rule which prescribes it to be the duty of persons to exercise care and caution in going upon railroad tracks, and to use their senses of seeing and hearing for the purpose of discovering and avoiding dangers, is one frequently found in reported cases, and, as a general rule, is salutary and just. But the duty of active vigilance must be adapted to the circumstances of the case, and if the defendant company has by its conduct and its published regulations led the public to believe that trains would not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company, and are not necessarily guilty of negligence when injured in so doing. The deceased was justified in supposing that no rapidly moving train would run by the station while he was crossing the tracks in going to and from the same. He had frequently done so before and had been lulled into a sense of security by the immunity which he enjoyed. The law does not

forbid persons crossing railroad tracks, nor impose upon them exclusive responsibility for damages incurred while making such attempts. The question is whether the injured party under all the circumstances of the case exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances, and the question generally is one of fact to be determined by the jury. We think the jury could properly find that the deceased did under the circumstances of this case exercise such care and caution as exempted him from the imputation of negligence.

Brassell vs. *N. Y. C. & H. R. R. R. Co.*, 84 N.Y., 241, is a case where the injured party departed from the train and started in a diagonal direction across an intervening track, not towards the station, but towards the pathway customarily used by persons in leaving the train, and living in the direction the injured party desired to go. It further appeared that the injured party in so doing did not look before stepping onto the track to see if a train was coming. The Court held in substance that a passenger when taking or leaving a railway car at a station has a right to assume that the company will not expose him to nunecessary danger, but will discharge the duty which requires it to provide passengers a safe passage to and from the train, and a passenger is not in all cases liable to be charged with contributory negligence because he attempts to cross an intervening track without looking for an approaching train.

In *Chaffee* vs. *B. & L. R. R. Co.*, 104 Mass., 108, the Court say in substance: If at a railroad station the direct and usual course for passengers to reach the cars waiting to receive them is by crossing one of

the tracks of the company, they have a right to rely to some extent for their safety in crossing upon proper and usual signals of warning to be given by trains or cars approaching upon it.

The fact that a person, who, in attempting to cross a railroad track under such circumstances, does not at the instant of stepping on it look to ascertain whether a train is approaching is not conclusive of a want of care on his part. And where at a railroad station the direct and usual course for passengers to go from the station house to trains going northward was by crossing a platform eight feet in width, and then one of the tracks of the company intervening, and that a person in so doing before reaching the intervening track looked up and down the same, but did not do so just before he stepped thereon, the question whether he used due care was for the jury.

In *Whealock* vs. *B. & O. R. R. Co.*, 105 Mass., 203, the Court say in substance: That where a person brings action against a railroad corporation for personal injuries sustained at a station of the defendant by being struck by a train running at an unusual speed, and without any warning of its approach, upon a track which the injured party was attempting to cross, as was usual for passengers to do, and as other persons were doing at the same time, he being on his way from the station to the train standing upon a track lying north of the one he was about to cross, there being no evidence that before entering on the south track he looked westward for the purpose of ascertaining if a train was approaching upon that track or from that direction, but the evidence tending to show that the distance he walked from the platform to the south track was

about forty feet, and while walking the first twenty feet he was looking westward upon the platform to see an acquaintance, and his line of vision embraced the track over which the train came from that direction, and that he neither saw nor heard the approaching train, the question whether the injured party used due care was one for the jury. The Court further said: A person cannot be said to be in the exercise of due care who enters upon a railroed track without using reasonable vigilance to ascertain whether a train is approaching, but the care which a prudent man would use depends upon the circumstances of the case. Thus, a person crossing a track at a highway without looking to see if a train was approaching, and without any reasonable excuse for not looking, and who thereby receives an injury,would be guilty of negligence and could not recover. On the other hand, when a person attempts to cross a railroad track at a station for the purpose of going to or from a train without looking to see if another train is approaching upon an intervening track, the point where he crosses being one frequently used by passengers in going to and from the train, it would be a question for the jury whether, in crossing without looking, he was in the exercise of due care.

Pennsylvania Ry. Co. vs. *White*, 88 Pa. St., 327, is a case where White took passage on a local train for a place called Penn Valley. After leaving the first station east of his destination, the brakeman, as was the custom of the road, announced the next station to be Penn Valley. Shortly after, the train slowed up, and stopped opposite a platform, the station house being marked "Penn Valley Station." White stepped off the car on the left side, and started to

cross an intervening track to reach the platform, and was struck by a passing express train, and instantly killed. It appeared that the train upon which he had been riding had stopped in compliance with a rule of the company that local trains should give preference to express trains at stations, and that the regular platform for local passengers to alight on was on the right hand or opposite side from that on which White alighted. The Court held that the question of contributory negligence was properly submitted to the jury. The Court further stated that the rule that it is the duty of a person about to cross a railroad track to stop, look, and listen is not always applicable to a passenger leaving a train and crossing the track in going to and from the depot at the point of destination. The negligence is usually a question for the jury, and always so when there is doubt as to the inference to be drawn from the facts, and that where the measure of duty is ordinary and reasonable care, and the degree of care varies according to the circumstances, the question of negligence is necessarily for the jury.

Philadelphia Ry. Co. vs. *Anderson*, 72 Md., 519, is a case where the plaintiff was a passenger on defendant's train destined for Chester. The name of the station was called on the train coming to a stop. As the plaintiff reached the platform of the car the train started, and fearing he would be carried to the next station, he got off and stepped upon another track, and was immediately struck by a train going in the opposite direction. It was shown that passengers were in the habit of leaving trains at that station on the same side as the plaintiff without objection by the company; also that a rule of the company required a

train approaching a station where another train was receiving or discharging passengers to come to a stop before reaching the station. *Held*, that the happening of the accident under the circumstances shown made a *prima facie* case of negligence against the company. *Held*, further, that the question of the contributory negligence of the plaintiff was one to be submitted to the jury.

In *Robostelli* vs. *N.Y., N. H. & H. Ry. Co.*, 33 Fed., 696, the Court say, that running a railroad train at a high rate of speed at an unusual hour, without warning, past a train standing at a platform discharging its passengers, who, to reach their destination, must cross the track of the moving train, is evidence not only of neglect of common care, but of recklessness and gross negligence, and that whether or not a passenger on a railroad train alighting on a track at the side of a train instead of on the platform, with the knowledge of the conductor of the train, and without objection from him, is guilty of negligence, is a question of fact for the jury to determine under all the circumstances. This case is quite lenghty, and goes fully into the facts, and is almost identical with the one under consideration.

Upon this question we desire to further call the attention of the Court to the following cases which are as applicable as the cases already cited:

Keefe vs. *Boston Ry.*, 7 N. E., 874.

B. & O. Ry. Co. vs. *Hauer*, 60 Md., 449.

D., L. & W. Ry. Co. vs. *Trautwein*, 1 Am. & Eng. Corp. Reports, 688.

Read vs. *N.Y., N. H. & H. Ry.*, 17 N.Y. Supp., 891; same case, 32 N. E., 1014.

Hoffman vs. *N. Y. C. & H. Ry.*, 75 N. Y., 605.

Richmond & D Ry Co v Powe 149 U.S. 43

Gaynor vs. *O. C. & N. Ry. Co.*, 100 Mass., 208
Terry, as adm., vs. *Jewett*, rec., 78 N. Y., 338.

We contend that under the circumstances of this case the question of defendant in error's contributory negligence was one that should be left to the jury. It certainly is a question upon which the minds of different men might reach different conclusions, and under the rule laid down by this Court in *Ry. Co.* vs. *Stout*, 17 Wall., 657, and followed in *Hayes* vs. *M. C. Ry. Co.*, 111 U. S., 228, should be submitted to the jury.

All of the foregoing cases are as nearly applicable to this case as any one case can be to another. Some of them are almost identical so far as the surrounding circumstances are concerned.

The cases cited by the learned counsel for plaintiff in error are very readily distinguishable from the case under consideration. They are all from states from which the authorities cited in this brief are taken. We desire to refer to the inapplicability of these cases cited by counsel for plaintiff in error.

The case of *Bancroft* vs. *Ry. Co.*, 97 Mass., is a case where a person attempted to cross a double track without either looking or listening to ascertain if a train was coming, and at a time when the train from which he had departed so obscured his view that he could not see a train coming, although a train was liable to pass at that very time; while the defendant in error in this case did look before crossing the track, but saw no train, and under the circumstances

under which the train which struck him was run could not see it, there being no headlight on it.

In the case of *Forsythe* vs. *Ry. Co.*, 103 Mass., the injured party left the platform or way where passengers usually walked in leaving the station grounds, and stepped down on the track, and started to walk along obliquely across the same. In doing so he stepped into the cattle guard and was injured. It was not customary for people to walk along these tracks as the injured party did. In fact they could not, very well, without stepping into or over this cattle guard.

In *Gonzales* vs. *N. Y. C. & H. R. R. R. Co.*, 38 N. Y., the injured party was attempting to cross the tracks at the end of the platform at a street crossing at a time when he knew that an express train was about to pass that very point, and did not look to see if it was coming. The facts further show that if he had looked he must have seen it, because it was within a short distance of him, in plain sight, and in broad daylight.

In *Zebe* vs. *Ry. Co.*, 33 Pa. St., 318, the regular platform and place where the railroad company received and discharged its passengers, and where it was customary for all passengers to go, was on the north side. The injured party in that case stepped off on the south side, started across the tracks and was injured. It was not customary or necessary for persons to get off at or cross to that side in order to reach the station.

The case of *Ry. Co.* vs. *Ricketts*, 19 S. W., 182, is one where the injured party got off on the side opposite to the platform at a place where it was not customary for passengers to board trains and depart from the same, and stepped upon a track for the pur-

pose of avoiding a walk of eight feet. In so doing he stumbled over a box and was injured. In that case the Court simply decided that it was not necessary for the railway company to keep the grounds on the side of the train on which the injured party stepped off lighted, that not being the place where it was customary for them to receive and discharge their pssengers.

The case of *Pastors* vs. *Ry. Co.*, 24 Atl., 283, was one where an intoxicated person left the train at midnight on the side opposite to that upon which the company received and discharged its passengers, and stepped through a bridge and was injured.

In the case of *Conley* vs. *N. Y. & N. E. R. R. Co.*, 32 N. E., the injured party stepped off on the side opposite to the station where the company received and discharged its passengers, and was struck by a train which had a headlight, and of the approach of which there was warning.

It was certainly competent for defendant in error to show that it was customary for the passengers to cross the south-lying track in going to and from the only station furnished by the railroad company for station purposes.

As stated by counsel for plaintiff in error this testimony was received without objection in the first instance.

The defendant in error had a right to rely upon the rule of the railroad company under which it protected passengers in crossing railroad tracks in going to and from this station. As stated in *Parsons* vs. *N. Y. C. & H. R. R. R. Co.*, 113 N. Y., 363, where the company by its own conduct and its published regulations has led the public to believe that trains would

not be run on these tracks at specified times, persons having occasion to cross them have a right to rely upon the assurance of the company as to that fact. This same principle is laid down in the case of *Philadelphia Ry. Co.* vs. *Anderson*, 72 Md., 519. While these rules are issued by the company for the guidance of their employes, they become public knowledge through the observance of the same by the employes, the public learning that it is customary for the company to so operate its trains, certainly have a right to rely thereon.

We respectfully submit that this judgment should be affirmed.

C. K. DAVIS,
M. D. MUNN,
Counsel for Defendant in Error.

combination with a transom to produce a different result or to cure a radical defect in its operation as a transom, is a new and patentable combination. It may be a combination of old devices, but that is as patentable as anything else under the law. The
148 result produced is the evidence of invention, in such a case, and, as already stated and shown, the result produced with the transom is different from that in the reference. It is a difference in kind, and not a mere new occasion for the use of the mechanism.

The examiner says, "that not the slightest change is required in Bayley and McCluskey's device to adapt it to any transom or set of transoms. Turn the sheet of Bayley and McCluskey's drawings so that the left-hand side becomes the top, and it meets literally applicant's 1, 2 and 4 claims. About this applicant makes no question," and seriously presents this as an argument.

In the first place, the drawing is not a reference. It is the invention illustrated by the drawing that we are to look to. If the invention were worked as the examiner proposes to "work" the drawing, Bayley and McCluskey would, no doubt, be somewhat astonished to find their railroad car tipped up on end, not to mention the discomfort and consternation of the passengers. Their interest in the operation of the windows, other than as a means of escape from a railroad accident, would not probably be very absorbing.

The examiner falls into very great error in his statement that applicant makes no question but that the reference is the same thing as his invention when the drawing of the reference is turned round. Applicant does make a very great question of it. The reference would not work even if the car itself were turned up. Place the slide-bars in the reference on the side of the car towards which the windows open, as is always done in transoms, and the whole device would be inoperative. The connecting links would then lock the bar instead of moving the window.

Respectfully submitted,

E. A. ELLSWORTH,
Att'y for Applicant.

149 No. 6126. JUNE 23RD, 1880.

United States Patent Office.

Before the examiners-in-chief, on appeal.

Application of J. F. Wollensak for a reissue of patent No. 136,801, dated March 11, 1873. Application for reissue filed September 17, 1878.

Transom-lifter and Lock.

The claims in dispute are the first, second, and fourth, as follows:

"1. The combination with a transom, its lifting arm and operating rod, of a support for the upper end of the operating rod to prevent it from being bent or displaced by the weight of the transom.

"2. The combination with a transom, its lifting arm and operating rod, of a support, and guide for the upper end of the operating rod.

"4. The guide G', arranged above the junction of the lifting arm and upright rod, in combination with the prolonged rod V, the guide G, and arm A, substantially as and for the purpose specified."

The third claim has been allowed. The fourth is the same claim as the second in the old patent, 1873, and cannot be seriously objected to. The second claim is now waived by applicant as being tautologous with the first, and he also desires to replace the word "support" used in the first claim by the word "guide," the original and more correct designation, which he should be allowed and required to do.

This narrows the matter in controversy to the consideration of the first claim, so amended. We see nothing in the reference cited bearing on the matter herein claimed. Wollensak's device is, in the first place, a "lifter" designed for raising against gravity a transom, hinged and swinging horizontally. The improve-
150 ment covered by the claim consists simply in furnishing the vertical operating rod with a guide above the lever connection, as well as below, to prevent the rod from being bent and displaced and thus impaired for operating, as occurs with the old form.

Nothing of all this is found in the reference. There are no transoms, no lifters, no gravitating weight to be supported, and no tendency to bend the operating rod by any incumbent weight. Simply a series of windows, hinged in the French style, and arranged to be simultaneously opened and closed by a continuous rod or rods in guides with lever connections to each window, so arranged that they could not afford support for the same, did their weight bear upon the rods. The one invention could never suggest or dominate the other, and if made by the same applicant the office would undoubtedly be swift to require division and separate patents for the same. To construe Bayley and McCluskey's patent as covering Wollensak's device now in dispute, would be to concede to them much broader claims than any set up by the latter.

We must hold that applicant is entitled to what he now claims, subject to his own suggested amendment of the first claim, and therefore reverse the examiner's decision regarding the first and fourth claims, while affirming it as to the second claim.

H. H. BATES,
R. L. B. CLARKE,
Examiners-in-Chief.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *June 23rd*, 1880.

J. F. Wollensak, care "E. A. Ellsworth," Cinn., Ohio.

SIR: Your application for a patent for an improvement in
151 transom-lifters and locks (reissue), application for reissue filed

Sept. 17, 1878, has been considered by the examiners-in-chief, upon appeal, and they reverse the examiner's decision regarding the first and fourth claims, while affirming it as to the second claim. Copies of the decision will be furnished at the usual rates.

Very respectfully,

E. M. MARBLE,
Commissioner of Patents.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the files of this office of the disclaimer, filed November 20, 1886, in the matter of the reissue letters patent granted John F. Wollensak, July 20, 1880, number 9307, for improvement in transom-lifters.

In testimony whereof I, R. B. Vance, acting Commissioner of Patents, have caused the seal of the Patent Office to be [SEAL.] affixed this 14th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

R. B. VANCE,
Acting Commissioner.

Disclaimer.

To the Commissioner of Patents:

Your petitioner, John F. Wollensak, a citizen of the United States, residing at Chicago, in the county of Cook, and State
152 of Illinois, represents that in the matter of a certain improvement in transom-lifters, for which reissued letters patent of the United States, No. 9307, were granted to him on the 20th day of July, 1880, he is still the sole and exclusive owner of said reissued letters patent, and that he has reason to believe that, through mistake, the first claim of said reissued letters patent is too broad, as construed by the courts.

Your petitioner therefore hereby enters his disclaimer to the broad combination or invention described and claimed in said first claim, and desires said first claim to be considered and treated as erased, expunged and cancelled, and limits himself to the combinations and inventions set forth in the second and third claims of said reissue.

Chicago, November 16, 1886.

JOHN F. WOLLENSAK, *Petitioner.*

Witnesses:
EPHRAIM BANNING.
THOMAS A. BANNING.

153 COMPLAINANT'S EXHIBIT SARGENT LETTER No. 1.

Office of Sargent & Co., 37 Chambers street.

P. O. box 4041. NEW YORK, *April 17th*, 1880.

Mr. J. F. Wollensak.

DEAR SIR: We are getting out a new catalogue of hardware manufactured by ourselves and very many other manufacturers, and shall issue 6,000 complete copies. We are to furnish 12 to 15 wholesale hardware merchants of this country with 2,500 to 3,000 copies of this list, with their name on the title page and on the cover (which virtually makes them their lists), and they are to distribute them to their customers. The balance we distribute to our customers all over this country, and to some extent in every nation of the globe. As we do not make any charge whatever for this book, not even to those who have their names on the title page and cover of from 100 to 350 lists each, we will give you an opportunity to advertise your patent transom lifter and lock on one page, at an expense to you of $200.00. We do not advertise any articles that we do not sell, and shall not issue another list for three years. Can you see it for your interest to advertise your transom-lifters? An early answer will oblige

SARGENT & CO.
MUNSON.

COMPLAINANT'S EXHIBIT SARGENT LETTER No. 2.

Office of Sargent & Co., 37 Chambers street.

P. O. box 4041. NEW YORK, *April 26*, 1880.

Mr. J. F. Wollensak.

DEAR SIR: In answer to yours of the 24th inst. we inclose a page from our old catalogue; the new book will be just the same
154 size page. We would like to have the matter within the next ten days or so. You are somewhat familiar with our catalogue, and know our style of doing things, so please bear this in mind in making up your copy, and do not write up too much descriptive matter. We like to make things plain, so that any one can understand (even foreigners) without any unnecessary type.

Very truly yours,

SARGENT & CO.
LADD.

COMPLAINANT'S EXHIBIT SARGENT LETTER No. 3.

Office of Sargent & Co., 37 Chambers street.

P. O. box 1617. NEW YORK, *April 10th*, 1884.

Mr. J. F. Wollensak.

DEAR SIR: We are about publishing a new catalogue of hardware, comprising the goods of our own manufacture, and also those of a large number of other manufacturers in our line.

We shall issue twelve thousand (12,000) complete lists. Of these, we are to furnish to the wholesale hardware merchants in the United States, seven thousand (7,000) to seventy-five hundred (7,500) copies with their name on the title page and on the cover (making it their own book to be distributed by them to their customers). The remainder we will distribute among our customers all over this country, and fifteen hundred (1,500) to two thousand (2,000) will be sent to other countries outside of the United States and Canadas. We make no charge whatever for this list, not even to those parties who will have their names on the title page and covers of from 25 to 350 books each.

155 Would you like to avail yourself of an opportunity to advertise your transom-lifter on one page, as they now are in our 1880 catalogue, at an expense to you of $300.00?

We do not issue another book for 3 years, consequently you get a three years' ad.

Your early answer will oblige us, as we are about ready to print such goods as they should go with.

Yours truly,

SARGENT & CO.,
Per GEO. MUNSON.

(Telegram.)

NEW YORK, *April* 21, 1884.

To Mr. J. F. Wollensak, Ch'go:

Wire your answer to our letter of April 10th.

SARGENT & CO.

I, Samuel E. Hibben, special examiner, duly appointed by the circuit court of the United States for the district of Connecticut, do hereby certify that all the proceedings aforesaid were had as stated in the cause named in the caption hereto; that on the several days named in said caption, or in the depositions hereto annexed, I was attended at the office of Messrs. Banning & Banning & Payson, rooms 527–530, Temple court, 225 Dearborn St., Chicago, Illinois, by counsel for said parties and by the witnesses aforesaid; that each of said witnesses was duly sworn and examined, and said depositions were reduced to writing from their statements, respectively, and read over to the witnesses and by them subscribed in my presence, respectively; and that all the exhibits mentioned or referred to were introduced in evidence in said cause during the taking of said depositions.

I further certify that I am not related to or counsel for either of said parties, or in any way interested in the result of said suit.

SAMUEL E. HIBBEN,
Special Examiner.

Chicago, Illinois, November 23rd, 1889.

156 And on the 30th day of December, 1889, defendant's evidence was filed, in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut. In Equity.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY.

Reissue No. 9307.

Evidence for Defendants.

Testimony taken under and pursuant to the 67th rule of the Supreme Court of the United States, in equity, as amended, before Francis G. Beach, notary public and special examiner by consent, pursuant to notice and by consent of parties.

NEW HAVEN, CONN., *May* 31*st*, 1889—10 o'clock a. m.

Met pursuant to notice.

Present: Ephraim Banning, Esq., of counsel for complainant; John K. Beach, Esq., of counsel for defendant.

157 JOHN E. EARLE, a witness produced by and on behalf of the defendants, having been duly sworn, to interrogatories proposed by JOHN K. BEACH, Esq., of counsel for defendants, testified as follows:

Int. 1. What is your name, age, residence and occupation?

Ans. John E. Earle; I am fifty-eight years old; I reside in New Haven, Conn., and am a solicitor of patents.

Int. 2. What, if any, experience have you had to qualify you to testify as an expert in patent causes?

Ans. In 1849, I began the study of practical mechanical drawing; I was engaged from that time onward in making drawings for the perfection and reduction to practice of numerous inventions, and also for the construction of various machines and mechanical structures, and also architectural drawings. In 1851, I prepared my first application for letters patent.

From that time on until 1862, in connection with mechanical drawing, I prepared numerous applications for letters patent. Beginning in 1862, I gave my time almost exclusively to patents, and since which time I have personally prepared more than 7,500 applications for letters patent in the United States and foreign countries. This has necessitated my frequent investigation of the state of the art in numerous branches, to ascertain novelty of inventions.

158 During the past 18 years, I have made many investigations into the state of the art to ascertain the validity and scope of letters patent, and with reference to questions of infringement; and during that time have testified as mechanical expert in a very large number of patent causes in the United States courts. I have acted as a member of several boards of arbitrators to determine the scope and validity of letters patent; questions of infringement and value of inventions, and have also acted as referee in cases involving similar questions.

(Defendants' counsel offers in evidence Patent Office copy of letters patent to Stickney & McGee, No. 81703, Sept. 1, 1868; also to same patentees, No. 85143, dated Dec. 22, 1868; also Bailey & McCluskey, No. 79541, dated July 7th, 1868; also to F. E. Brown, No. 93408, dated Aug. 10, 1869; also to G. W. Perry, No. 126,327, dated April 30, 1872; also to N. W. Speers, No. 7998, dated March 25, 1851; and the same are marked respectively, Defendants' "Exhibit Stickney & McGee Patent No. 1;" "Stickney & McGee Patent No. 2;" "Bailey & McCluskey Patent," "Brown Patent," "Perry Patent" and "Speer's Patent." F. G. B., defendants' ex.)

159 Int. 3. Have you read and do you understand reissued letters patent of the U. S. No. 9307 granted to John F. Wollensak, dated July 20th, 1880, the same being reissue of letters patent No. 136,801, dated March 11th, 1873?

Ans. I have read and believe I understand said reissued letters patent and the invention therein described, and also the original patent referred to in the question.

Int. 4. Please compare said letters patent and the original thereof and state what, if any, differences you find between said reissue and the original.

Ans. I have compared the reissue with the original patent and find the specification to be substantially the same in both except that the general statement of the object of the invention preparatory to the description of the invention as illustrated in the drawings, in the original is specifically described, whereas in the reissue that specific description is omitted and a statement introduced, indicating that the invention is not to be understood as limited to any specific construction, but is to be regarded "as covering broadly any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom."

In the original patent there are two claims only, which are the same as the second and third claim of the reissue. The 1st claim of the reissue is new.

Int. 5. Please examine the issued patent in suit, No. 9307, and state what you find to be the new thing described in the 3rd
160 claim thereof in view of the state of the art as shown in the exhibits.

Ans. The invention of the said reissued patent relates to devices for operating sashes which are hung so as to swing in contradistinction to sliding sashes, such swinging sashes being commonly used for ventilating purposes, sky-lights, etc., and are ordinarily out of easy reach, hence some devise is desirable by which the sash may be turned upon its hinges or pivots, to open and close the opening in which the sash is hung.

In the preamble to the specification, reference is made to the prior state of the art to indicate difficulties which existed in the prior construction. That reference to the prior state of the art is in the following words:

"Transom-lifters have heretofore been constructed with a long

upright rod or handle, joined at its upper end to a lifting arm which extends to, and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting arm.

Lifters or sash-adjusting devices thus referred to in the specification, I understand to be such as illustrated and described in "Defendants' Exhibits, Stickney & McGee No. 1," "Stickney & McGee No. 2," and "Perry Patent."

161 In each of the said three exhibits, the sash is represented as hung upon central pivots instead of upon hinges at one edge of the sash as in the Wollensack patent, but I do not understand that the point at which the sash is hung is material, for the reason that prior to the Wollensak patent the hanging of sashes upon central pivots and upon hinges at one edge of the sash were equally well known, and the device of the Wollensak patent is equally applicable to both methods of hanging, and is so applied, to my knowledge, and operates the same in one sash case as in the other.

I have caused to be prepared a model illustrating a transom-lifter such as I understand to be recognized in the quotation which I have made from the specification of the reissued patent No. 9307 as the state of the art known by Wollensak at the date of his invention, and that model I here present.

(Defendants' counsel here offers in evidence the model referred to by the witnesses, and the same is marked "Defendants' Exhibit Common Transom-lift." F. G. B., sp. ex.)

The specification of the said reissue No. 9307, immediately following the quotation which I have made, states:

"The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support and guide for the upper end of the lifting rod during its vertical movements, and while at rest."

162 That is to say, as I understand it, the invention consisted in extending the operating rod of "Defendants' Exhibit Common Transom-lift" upward, and providing a guide on the joint at a point above where the arm is hinged to the operating rod, and so that the said rod will have a support above the said connection between the arm and rod. The extension of the rod and arrangement of an additional guide above the connection between the arm and rod is the alleged invention of said reissued patent, No. 9307, made the subject of the third claim thereof.

The said reissued patent, No. 9307, in illustrating and describing the alleged invention shows a rod arranged to move in a line at right angles to the axis upon which the sash turns, the said rod being supported in two stationary guides so as to permit free longitudinal movement of said rod. An arm is hung to the said rod between the said two guides, and so that the end of the arm so

hinged to the rod will move with the rod. The said arm extends in an oblique direction from its hinged end, and its other end is hinged to the sash at a point out of line with the said sliding rod, and so that when the sash is closed the said arm will be inclined from the said rod in the direction in which the sash swings in opening.

This operating rod is called in the patent "lifting rod," "upright rod," and "prolonged rod," but it is the operating rod, or the rod through the movement of which the sash is opened or closed.

The arm which connects the operating rod with the
163 sash as I have stated, stands oblique to the line of the rod when the sash is closed. Because of this oblique position of the arm with relation to the rod, it follows that if the operating rod be moved, it will correspondingly move the point of connection between it and the said arm, and as the other end of the arm is fixed to the sash, and thereby cannot move in the direction of the rod, the said other end of the arm which is connected to the sash will be forced away from the rod, because the sash is free to give way to the movement of the arm in that direction, and the sash in so giving way under the force applied, turns upon its pivot or hinges, the arm swinging upon its hinge on the rod, and so that the sash will be opened, and then upon the return movement of the operating rod, the sash will be closed accordingly.

The state of the art as disclosed by the exhibits herein shows that long prior to the alleged invention of Wollensak, apparatus for operating hinged sashes and like devices for closing openings were well known, and in which operating rods were connected to the hinged sash by an arm hinged by one end to the sash, and by the other end to the operating rod, and in which the operating rod was supported, both sides of its connection with the arm. I refer first to "Defendants' Exhibit Speers' Patent." In this patent, the operating rod is arranged in a plane at right angles to the axis upon which the shutter turns, and is supported in bearing out two points. The

operating rod in this Speers patent is screw-threaded, and
164 is held in its two bearings so as to prevent longitudinal movement, but leave it free to rotate, that is to say, it is a rotating rod instead of a sliding rod as in the Wollensak patent in suit. On the rod of the Speers patent a nut is arranged and so that as the said operating rod is rotated, the nut will travel on the rod, toward or from the shutter to be operated accordingly as the rod is rotated. To the said nut an arm is hinged by one end, the other end of the arm being hinged to the shutter to be operated upon, and so that, when the shutter is closed the said arm stands in an oblique direction to the rod, and whereby when the end of the arm which is hinged to the rod is moved longitudinally on the rod, the same movement of the shutter is produced as by the rod and arm in the patent in suit.

The device of the Exhibit Speers' Patent, differs from that of the patent in suit only in the fact that in the Speers patent the operating rod rotates, whereas in the Wollensak patent the operating rod slides. The bearings for the rod are substantially the same in both

cases, that is, the bearings in the Speers patent firmly support the rod at two points, and these bearings or guides correspond to the bearings or guides G and G of the patent in suit. In the Speers patent the arm is connected to the operating rod between the two bearings of the rod, and so that the force of the arm upon the rod is sustained by the said two bearings, each side of the connection between the arm and rod substantially the same as in the patent in suit.

165 I have taken into consideration the fact, that in the said Speers' patent the device is described for a shutter-worker, but I do not understand it is material whether the thing to be operated upon is a closed panel like a shutter, or whether it is a glass panel like a sash. Neither do I consider it material whether the sash turns upon hinges so as to swing vertically, or whether it is hung upon hinges so as to swing horizontally; in any case the operating rod must be arranged to work in a line substantially at right angles to the axis of the hinges upon which the thing to be moved is hung.

The next patent to which I will refer, is "Defendants' Exhibit Bailey & McCluskey Patent."

In this patent I find illustrated and described, an apparatus for opening and closing the ventilating sashes in the upper part of a car. The said sashes being hung upon hinges so as to swing in a horizontal plane.

The devices for operating the sashes in this patent consist of a rod or bar supported in bearings and so that the said rod or bar may slide in the said bearings in a line at right angles to the axis upon which the sash to be operated upon is hung, combined with an arm hinged by one end to said rod or bar, and with its other end hinged to the sash.

A series of sashes is represented in the same line, the rod extending in the same relation to all the sashes of that series to be operated upon, and an independent arm provided for each sash. The

166 arms stand oblique to the rod in the same manner as does the arm in the patent in suit, and so that a longitudinal movement, imparted to the rod in one direction through the arm, causes the sash to open, and a return movement of the rod will close the sash as in the patent in suit.

In the said Bailey & McCluskey patent, the rod or bar is supported in several guides and each arm is hinged to the rod between two guides, and so that the rod or bar is supported so as to "prevent it from being bent or displaced by the weight" or resisting the force of the sash.

In the said Bailey & McCluskey patent, the operating rod is horizontal for the reason that the sashes are hung to swing in a horizontal plane, but the operating rod or bar has precisely the same relation to the sash to be operated upon, as has the operating rod in the patent in suit; and the connection between the operating rod and the sash in both cases is the same; and in both cases the operating rod is supported by guides, each side the junction of the arm with the rod, substantially alike in both cases.

I do not consider the fact material that in the Bailey & McCluskey patent there was a series of sashes to be operated upon, and that a single rod is employed to operate all the sashes alike, and independent connecting arm between the rod and each sash, whereas the patent in suit illustrates but a single sash to be operated upon, and for the same reason that each sash in the Bailey & McCluskey
167 patent is independent of the others, and the devices, whereby all are operated by a single movement of the rod, are but duplicates of each other.

I have caused to be made a model illustrating the device of the Bailey & McCluskey patent, showing two or more sashes operated by a single rod.

(Counsel for defendants offers in evidence the model last referred to by the witness, and the same is marked "Defendants' Exhibit Bailey & McCluskey Model, No. 1," F. G. B., sp. ex.)

To illustrate, the Bailey & McCluskey device, as applied to a sash swinging in a vertical plane, as in the patent in suit, with a single sash I caused to be made a model of the Bailey & McCluskey device applied in the same manner as the device in the patent in suit.

(Defendant's counsel here offers in evidence the model last referred to by the witness, and the same is marked Defendants' Exhibit Bailey & McCluskey Model, No. 2, F. G. B., sp. ex.)

For the convenient comparison of the different devices I have also caused to be made a model of the patent in suit. This
168 model, also illustrating the fact that it is immaterial, so far as the construction and operation of the devices of the patent in suit are concerned, whether the sash swings in a vertical or a horizontal plane.

(Counsel for defendants here offers in evidence the model last referred to by the witness, and the same is marked "Defendants' Exhibit Wollensak Model Reissued Patent, No. 9307, F. G. B., sp. ex.)

Adjourned to June 1st, 1889, at 10 o'clock a. m., same place.

NEW HAVEN, CONN., *June 1st*, 1889—10 o'clock a. m.

Met pursuant to adjournment.

Present: Ephriam Banning, Esq., counsel for complainants. John K. Beach, Esq., counsel for defendants.

Witness continues answer to Int. 5:

Comparing the devices described in the Bailey & McCluskey patent with the devices described in the patent in suit, I find the
169 Bailey & McCluskey patent to illustrate and describe the same invention as that illustrated and described in the Wollensack patent and that every element of the combination recited in the 3d claim of the patent in suit as the invention thereof is found in the Bailey & McCusker patent combined in the same manner and for the same purpose.

The words of the said 3d claim describing the invention of the patent in suit no better describe the alleged invention of the patent in suit than they do the devices illustrated and described in the Bailey & McCluskey patent.

In the Bailey & McCluskey patent there is "the guide G' (E), arranged above the junction of the lifting-arm and upright rod in combination with the prolonged rod U (D), the guide G (E), and arm A (F), substantially as and for the purpose specified" in the Wollensak patent and particularly recited in the 3d claim thereof.

I next refer to Defendants' Exhibit Brown Patent, in which I find a device for opening and closing window shutters, which consists of a rod arranged to slide in a line at right angles to the axis of the hinges upon which the shutter is hung; two guides, through which the said rod slides, an arm hinged by one end to the said sliding rod between the two guides, the rod prolonged so that it cannot escape from the upper or more distant guide, the other end of the said arm hinged to the shutter, and so that by imparting longitudinal movement to the said rod in one direction, the shutter will be opened, and by returning the rod, or drawing it in the op-
170 posite direction, the shutter will be closed. A set-screw is provided to engage the operating rod at any desirable point, so as to hold the shutter at such point.

The said set-screw for holding the rod is substantially the same device as that employed in the patent in suit for holding the rod at any point desired.

I do not however understand that this setting device or set-screw constitutes an essential feature or element in the combination recited in the 3rd claim of the patent in suit.

It is true that the device of the Brown patent is illustrated for operating a shutter. It is however equally applicable to a transom-lifter. The operating rod in the said Brown patent is in precisely the same relation to the axis of the hinge as the operating rod in the patent in suit, and as I before stated, I do not understand this changed position of the device to accommodate it to the changed position of the thing to be operated upon to constitute a material difference.

In the specification of the patent in suit the terms "above" and "upright" are used in describing the operating rod. I understand these terms to be relative only, and not as necessarily requiring the vertical position of the rod, but that on the contrary, the device of the patent in suit would be no less the device of that patent were it arranged in a horizontal or any other position instead of the vertical position shown and described in the patent in suit.

171 For the reason which I have given I find in the said Brown patent the same devices continued and opening in the same manner as illustrated and described in the patent in suit and particularly recited in the 3rd claim thereof, to wit: "The guide G (not lettered in the Brown patent) arranged above the junction of the lifting-arm and upright rod, in combination with the prolonged rod U (B,) the guide G (E,) and arm A (C,) substantially as and for the purpose specified" in the patent in suit. And if the set-screw

for holding the operating rod at any desired point is to be considered as an element necessary to the combination recited in the 3rd claim of the patent in suit, the Brown patent also shows and describes that element in the same combination in which it is shown and described in the patent in suit.

There is in my opinion no material difference between the device shown in said Brown patent, and that shown and described in the patent in suit, so far as the said 3rd claim is concerned but that on the contrary they are substantially alike.

I have caused to be prepared a model, illustrating the devices shown in the Brown patent, but applied to work from the same side of the jamb as the swinging sash or shutter, instead of through the jamb, as in the Brown patent. It being simply a change in the location without change in the construction or operation.

(Counsel for defendants offers in evidence the model last
172 referred to by the witness and the same is marked Defendants' Exhibit Brown Patent Model. F. G. B., sp. ex.)

For the reasons which I have given the 3rd claim of the revised patent does not in my opinion describe anything not found in the prior state of the art as shown by the exhibits herein.

Cross-examination by EPHRAIM BARRING, Esq., counsel for complainants:

X Int. 6. In order to be cheap, sightly and merchantable, the operating rod of a transom-lifter must be small, must it not?

Ans. It must be of a size to have sufficient strength for the work intended to be done. It would be unwise to make it larger than so required.

X Int. 7. Not mentioning possible exceptional cases, could a large rod be used practically for this purpose? That is as a merchantable article of builders' hardware.

Ans. As to what the trade would accept, I have no knowledge. For myself, I should prefer the rod to be as light as it practically or conveniently might be. The size of the rod, however, could make no difference in the combination or operation of the devices.

X Int. 8. Assuming the rod to be light would it not be liable to bend in use, especially if long, or used with heavy transoms?

173 Ans. If too light it would be liable to do that.

X Int. 9. The weight of the transom would cause the upper part of the rod, moving up and down, to spring or sway, would it not?

Ans. If the rod was too light the tendency of the weight of the transom would be to spring the rod inward or toward the jam-.

X Int. 10. This springing or pressing of the rod in would cause it to scratch or discolor the casing, would it not?

Ans. If the springing was sufficient to reach the jamb—that is, if the rod were too light or too weak, that would be the natural result.

X Int. 11. Would not this marring or discoloring of the jam-

also take place even where a heavy rod was used, if it was placed directly against or in contact with the wood?

Ans. Possibly it might if so arranged—that is, that part of the jam which was in contact with the rod might, if the rod was removed, show a discoloration.

X Int. 12. In the case assumed, would not the scratched or discolored jamb, or at least some part of the scratching or discoloration, always be visible whether the rod was removed or not?

Ans. If the rod happened to rub at the top or bottom, it would probably mar the jam at those points, and, when the rod was up, then it would show below the rod and *vice versa*.

174 X Int. 13. In the disclaimer or acknowledgment of the art which you have quoted from the Wollensak reissue in suit, reference is made to a construction in which the lifting arm is connected to the operating rod at the upper end of the rod, is it not?

Ans. It is.

X Int. 14. As I understand you, you say that this old device is illustrated in the two Stickney & McGee patents and in the Perry patent offered in evidence by the defendant?

Ans. Yes, sir.

X Int. 15. Do any of these patents referred to in my last question show guide supports to hold the operating rod out from the casing so as to distribute and take the strain at different points?

Ans. Yes, sir; to hold the rod out from the casing. The Stickney & McGee patent, No. 1, and Stickney & McGee patent, No. 2, both show a guide supporting the rod so that it cannot come into contact with the casing or surface upon which the guide is arranged, but there is no guide above the point of connection between the transom and the rod, and consequently the support of the rod to resist the turning of the transom is below the point of connection, and not both above and below as in the patent in suit.

X Int. 16. Does the disclaimer in the complainant's reissue in suit show, or refer to, guide supports holding the operating
175 rod out from the casing so as to distribute and take the strain at different points?

Ans. It does as I understand it, for the reason that the statement says, "when thus constructed, the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and lifting arm." The only bending effect which the weight of the transom can exert upon the lifting rod is toward the jam, if therefore the rod were bearing directly upon the jam, there would be no tendency to thus bend, hence the recognition of the possible bending effect is a clear indication to my mind, that the rods so recognized by the patent, were supposed to be supported in guides so as not to work in actual contact with the jamb.

X Int. 17. Does the complainant's disclaimer or acknowledgement of the art referred to, show any guide supports which hold the operating rod out from the casing or jamb in the way called for by the claim in suit?

Ans. It does not indicate the one guide which is placed beyond where the arm is attached, but as I understand the acknowledgment of the state of the art in the specification of the patent, this guide is the only thing, so far as the 3rd claim is concerned, not recognized as old.

X Int. 18. What is the difference between "support" and "guide" as used in the complainant's patent in suit?

Ans. No difference. The guides are the support of the rod in all cases.

176 X Int. 19. Then would you consider any kind of a "guide" to direct the vertical movements of the rod to be within the claim in suit?

Ans. Any guides which would support the rod and control its movements, I should say were the same as the guides G and G' of the patent in suit.

X Int. 20. Then you do not consider it material whether the guides hold the operating rod out from the casing or not. Is this what you mean?

Ans. No, sir, I do not. That is to say, if the device of the patent in suit were arranged in guides in the same way as in the patent, except that the rod would naturally hit the jamb in moving, it would in my opinion be within the combination of the 3rd claim.

X Int. 21. Then why has it been considered necessary to make the guides in the model Defendant's Exhibit Common Transom-lift in a form that always, positively hold the rod out from the door-jam-?

Ans. Because it is a convenient way of doing it and no mechanic would naturally think of doing it any other way, that kind of guide having been suggested in the patent in suit as the guide known in the art for that purpose. I say suggested by the patent in suit, because referring to the state of the art and the specification which follows, no intimation is given that the guides for the rod of this patent in suit are any different from the guides for the rod recognized by the said description of the state of the art. I have

177 no doubt that the reason why the particular guides found in the exhibit referred to in the question were employed was because the same style of guides were employed in making the model Defendant's Exhibit Wollensak Model, and in order that the two models should be alike, except as to the difference particularly pointed out in the patent in suit; and further that these guides were probably the most convenient of any at hand.

X Int. 22. Does either of the Stickney & McGee patents referred to in your testimony, show any operating rod jointed at its upper end to a lifting arm extending to and connected with a transom sash?

Ans. They show a connection between a transom and the free upper end of the rod, but it is not an arm hinged to both the transom and the rod.

X Int. 23. How about the Perry patent in this respect?

Ans. The Perry patent shows an arm hinged by one end to the operating rod and at the other end hinged to the sash.

X Int. 24. Then the Perry patent shows an operating rod jointed at its upper end to a lifting arm, extending to and connected with the edge of the transom sash, does it?

Ans. It does to a sash. It is not a transom sash because it is not arranged directly over a door. But I do not think the position of a sash makes it a different one. Therefore I answer, yes it does.

X Int. 25. In the Perry patent is the sash opened and closed by the vertical movements of the operating rod?

178 Ans. Yes, sir. The sash in the Perry patent swings upon a pivot at each end, and so that its swinging movement is in a vertical plane, in contradistinction to a horizontal plane, as in the Bailey & McCluskey patent.

X Int. 26. Then, treating the Perry car-ventilator as the equivalent of a transom, is it correct to say that the Perry patent shows a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the sash, the sash being opened or closed by a vertical movement of the long rod?

Ans. You misunderstand me in regard to the equivalency of the sashes or things to be operated upon. That is whether the thing to be operated upon be a transom, skylight, a shutter or a ventilator, in this regard I say it is immaterial which it is; it is the equivalency of the devices for operating such transom, skylight, shutter or ventilator that I have been comparing. I therefore say it is correct to say that the Perry patent shows an upright rod of sufficient length for the use intended, jointed at its upper end to a lifting arm which arm is adopted to be connected with the side or edge of the sash, and so that the sash may be opened or closed by the vertical movement of the said rod. And this, irrespective of whether the thing to be operated upon be a transom over a door, or a car-ventilator.

X Int. 27. In this Perry construction is the upright rod liable to be bent by the weight of the sash?

179 Ans. When the transom-lifter is applied to a transom which is hung upon its centers so as to be substantially balanced, a common method of hanging transoms, there can be no substantial strain on the operating rod due to the weight of the sash. And this is true of any transom-lifter applied to a transom so arranged. That is to say, if the transom-lifter of the patent in suit were applied to a pivoted transom, there would be no practical strain upon the lifting rod due to the weight of the transom.

In the case of a pivoted transom the bending-train, which would come upon the rod, would be due to the force which might be necessary to start or turn the sash on its pivots. In the Perry patent this strain would have a tendency to spring or bend the rod.

If the lifting device of the Perry patent were applied to a hinged sash or transom, then the weight of the sash would tend to bend or spring the rod above the bearing or guide in which the rod works.

X Int. 28. And this bending or spring of the rod would be owing to the want of support at or near the point of junction between the long rod and the lifting arm, would it not?

Ans. A guide or support applied to the rod above or beyond the point of connection would to a very considerable extent prevent the springing or bending of the rod. There can be no practical support for the rod at the point of connection between the rod and the lifting arm because there must be a space between the guides or bearings of the rod equal to the extent of movement of
180 the rod. And the bending or springing would be due both to the weakness of the rod and the lack of support for it. Such a support or guide beyond the point of connection with the lifting arm may be said to be near the point of connection in the same sense that the bearing or support of the rod upon the other side of the connection may be said to be near the connection.

X Int. 29. The Stickney & McGee and Perry patents are all intended for use in connection with car-ventilating windows, are they not?

Ans. Yes, sir; both hinged and pivoted.

X Int. 30. Which one — these three patents makes the nearest approach to the Wollensak patent in suit?

Ans. The Perry patent, because it shows and describes an upright rod combined with a guide to permit the vertical movement of that rod, and an arm hinged by one end to the rod and adapted to be hinged by its other end to the sash or thing to be moved; differing, therefore, from the third claim of the patent in suit only in that the operating rod does not extend beyond the point of connection between it and the arm, and consequently has a bearing or guide for the rod on one side only of the point of connection, instead of both sides, as in the patent in suit.

X Int. 31. Am I to understand then that you consider the Perry construction to be the same as that disclaimed or acknowledged to be old in the complainant's patent in suit?

181 Ans. It is an illustration of what I understand to be recognized in the patent as old, and certainly answers the description of the state of the art as described in the patent in suit.

X Int. 32. These Perry, and Stickney & McGee patents are the only ones referred to in your testimony which contemplate or provide for the "lifting" of any weight by means of the operating rod, are they not?

Ans. I understand by the expression "lifting of any weight," to mean the operation of a sash hinged in contradistinction to a pivoted sash. Am I correct?

X Int. 33. No, I use the word "lifting" in its plain, natural, ordinary meaning, and I do not now care anything about the other parts, or how they are arranged.

Ans. No, sir, they are not. The devices of the Speers' patent, the Bailey & McClusky patent, and the Brown patent, are devices which provide for the "lifting of any weight" by means of the operating rod. The power exerted upon the rod by the operator is no more a lifting operation, because of its being vertical, than it is on the same device when exerted horizontally. I therefore understand the term "lifting" to mean the power applied to the operating rod irrespective of the direction in which the rod moves; the result of such ap-

plication of power being the same, whether the apparatus be arranged vertically or horizontally.

X Int. 34. When you open or shut a door hinged in the ordinary way, do you "lift" the weight of the door?

182 Ans. In the case of a trap-door, yes, sir; in the case of a vertical door, I pull the door to open and push it to close it. If I am on one side of the door, on the other side of the door the action is reversed. By trap-doors I mean doors such as are arranged in nearly horizontal position, as in bulk-heads, floors, etc.

X Int. 35. When you open or close an ordinary window shutter, hinged in the ordinary way—by which I mean a vertical shutter, hinged at one edge, do you "lift" the weight of the shutter or any material part of it?

Ans. If a thing be hinged so as to swing in a horizontal plane, the movement for opening or closing will be in a direction of a push or pull, but if hung so as to swing in a vertical plane, or substantially so, then the operation may be called a lift. The term lifting or pushing or pulling, describing substantially the same movements of the same thing, distinguished only by the plane in which the thing moves when so operated upon. In the case of the shutter, therefore, I should say I pushed or pulled according to the side of the shutter I happened to be when operating, the same as in the case of a door, correspondingly hung.

X Int. 36. Do not the Speers & Brown patents show shutters hinged so as to swing in a horizontal plane?

Ans. Undoubtedly the devices of the Speers & Brown patents both contemplate operating shutters which are hinged so as to swing in horizontal planes. But by this statement I do not

183 wish to be understood as saying that they are not equally adapted to operate window shutters hung to swing in a vertical plane.

X Int. 37. In both these patents the shutters open outwardly, that is, away from the *s*ide at which the operating rod —, do they not?

Ans. No, sir. Both patents show the operating rods arranged in a line at right angles to the hinges, and parallel with the arm which connects those rods to the shutters, and as the shutters are apparently on the outside of the house, and the rods extend to the inside of the house, the end of the rod to which the power is applied may be said to be on the inside of the house, while the shutters are on the outside of the house.

X Int. 38. Does either of these two patents show guide supports for the operating rod?

Ans. Both of these patents show the operating rod supported in bearings on both sides the point where the arm is connected to the rod.

X Int. 39. The car-ventilators of the Bailey & McCluskey patent also open outwardly, that is away from the side of which the rod is placed, do they not?

Ans. The sash being hung so as to swing outward, the operating rod is naturally upon the inside of the car; that is, the sashes are

hung to swing outwardly, and the operating rod arranged upon the inside and connected to the sash on the outside.

X Int. 40. In this Bailey & McCluskey patent there is only one guide for each window. Is not this true?

184 Ans. It is not; for the sash at the extreme left there are two guides, one arranged near the edge of each opening, and the arm is hung to the rod between those two guides. The sash at the right has the same arrangement of guides each side the arm connection. The illustration, as I understand it, shows only the central portion of the car-ventilator, it being broken away at both ends, and I understand that the operating rods extend in both directions from the center throughout the whole series of ventilators, and that the same two guides are provided for the operating rod for each sash; the two rods at the center of the car are connected to a lever by which both rods may be operated. At these center ends a single guide is provided for the rod at one side of the ventilator opening; but in this case these are two guides for the rod, one each side of the point of connection with the arm, the guide at the side of the next opening forming such second guide. That is, in the illustration, the guide between the two openings serves the double purpose of supporting the rod against the strain of the two sashes. Hence I say that the operating rod is provided with a guide or support at each side of the point of connection of each arm. That is, each point of connection on the rod has two supports, one each side of that point.

X Int. 41. The handle rod for opening and closing the ventilators shown in the Bailey & McCluskey patent is the lever which

185 you refer to in your last answer, when you speak of the two side rods being "connected to a lever by which both rods may be operated." Is is not?

Ans. I mean that which is called in the patent a lever, and is marked I, and it is by means of that lever that the two rods are simultaneously moved.

X Int. 42. Then, if the Bailey & McCluskey patent has any operating rod for opening and closing the ventilators, it is this lever marked I, is it not?

Ans. No, sir; that lever, so far as moving the operating rods are concerned, is simply a handle conveniently connecting the two so that they may be simultaneously operated; the operating rods are the horizontally sliding rods arranged in guides respectively above and below the sash, and to which the respective arms are hinged.

X Int. 43. If it should be attempted to use the Bailey & McCluskey construction for opening the ventilators inwardly or toward the side at which the sliding bars are placed, would not the connecting links lock the bars instead of moving the windows?

Ans. No, sir; they would not. If so hinged upon the inside it is only necessary to make a suitable connection between the sash and its arm to operate as well upon the inside as upon the outside.

X Int. 44. If both the Bailey & McCluskey device and complainant's device had been invented by the same party and presented in one application for a patent would not the Patent Office,

in the ordinary course, have required a division of the application so as to have the two devices covered by separate pat-
186 ents; one patent relating to the car-ventilators devices and the other to the transom-lifter devices?

Ans. It is very uncertain to predict what will be done by an examiner in the Patent Office. But if any application had been made embracing all the figures of the drawing of the patent in suit, and all the figures of the drawing of the Bailey & McCluskey patent, and the application had contained the two claims original of the Wollensak patent, together with the claim of the Bailey & McCluskey patent, then a division would undoubtedly have been required or should have been, not because of the application described both a car-ventilator and a transom-lifter, but because of claiming two different inventions, one of which was shown in one set of figures and the other in the other set. But if, in the application of Wollensak, all the figures of the drawing of the Bailey & McCluskey patent had been introduced as a modification of the Wollensak invention, illustrating the application of said invention to the operating of car-ventilators, and the claim made in the identical words of the second claim of the original patent (the third claim of the reissue), then there would have been no ground for a division and the claim would undoubtedly have been allowed as it was in the Wollensak application, and for the reason that the Bailey & McCluskey illustrations would have clearly shown a fair modification of the invention show- in the principal figures, illustrating the invention as applied to a transom.

187 X Int. 45. As a patent solicitor of large experience, you consider it necessary that in order to be patentable, a combination must be practically operative, do you not?

Ans. What do you mean by practically operative?

X Int. 46. I mean, capable of use.

Ans. I do not feel called upon to define the laws of combinations. If however you will state a combination on which you wish my opinion, I will endeavor to give you my opinion as to whether or not it is a practical, by which I understand you to mean operative combination.

X Int. 47. Is it not also a familiar rule of the patent law, that whenever possible, a claim should be so construed as to make it cover a practically operative invention?

Ans. I do not feel called upon here to give my views on patent law or rules for construing patents, and unless counsel for defendants otherwise instructs me, I must decline to answer the question, and for the further reason, that I am not a lawyer, a qualification usually supposed to be necessary to answer the question like the one proposed.

X Int. 48. Are you not familiar with the rules of construction applicable to patents?

Ans. I have never been examined to determine whether I am or not. I may have my own opinion, but do not care to blow my own horn testifying as a mechanical expert in this cause. I thank the counsel however for his evidently good intention.

Adjourned to June 3, 1889, at 10 o'clock a. m., same place.

188 NEW HAVEN, CONN., *June 3rd*, 1889—10 o'clock a. m.

Met pursuant to adjourtment.

Parties present as before.

X Int. 49. In your answer to X Int. 19, you say in substance that you do not consider it material whether the guides hold the operating rod out from the casing or not. Then I take it that you consider the guides of the Bailey & McCluskey patent to be essentially the same as the guides of the reissue in suit.

Ans. Certainly they are so far as guiding and supporting the rod is concerned, and for the reason that I do not understand from the reissue patent in suit that there is any novelty or peculiarity of construction of the guides mentioned in the specification. They do not differ except in being a simple loop around the bar, instead of an eye-shape; both being common devices for the same purpose.

X Int. 50. Which of the several patents introduced by the defendant do you consider as making the nearest approach to the reissued sued on?

Ans. I consider the Brown patent and the Bailey & McCluskey patent to illustrate substantially the same devices as the device of the reissued patent in suit, each of the said patents, Brown and Bailey and McCluskey, shows the same elements described in the reissued patent in suit, combined in substantially the same
189 manner and substantially for the same purpose as the same elements are combined in the patent in suit, and as particularly recited in the third claim thereof.

As each of the patents, Bailey and McCluskey and Brown combine every element of the third claim, and can be no nearer the combination of the said 3rd claim than the other.

X Int. 51. Do these Brown and Bailey and McCluskey patents, or either of them, make any nearer approach to the device covered by the claim sued on, than the device referred to in the disclaimer's, or acknowledgment of the art contained in the Wollensak specification?

Ans. They make just the same approach to the state of the art recognized in the patent in suit as does the combination of the 3rd claim of the patent in suit to that state of the art. That is to say, the state of the art so recognized in the patent contains all of the device so far as the combination of the said 3rd claim is concerned found in each of the patents, the reissued patent in suit, the Bailey and McCluskey and the Brown patent; except the additional guide or support for the rod arranged beyond the point of connection between the arm and the operating rod.

X Int. 52. Do you mean by this that the Bailey and McCluskey and the Brown patents show all the elements of the 3rd claim in suit, while the acknowledgment of the art referred to omits at least one of them?

190 Ans. I mean that the several patents to which I have referred as illustrating the state of the art recognized in the patent, to wit: the Perry patents show all the elements of the combination recited in the 3rd claim of the reissued patent except the

guide for the rod beyond its point of connection with the arm. Hence it does serve to illustrate the state of the art recognized in the patent in suit. The Bailey and McCluskey and the Brown patents show this additional guide, together with all the other elements of the 3rd claim in suit; hence both these last-mentioned patents, like the patent in suit, contain all that is recognized in the patent in suit as the prior state of the art, plus the guide for the rod beyond the point of its connection with the arm. I therefore mean that the Bailey and McCluskey, and the Brown patents, as I have stated in my direct testimony, show all the elements of the 3rd claim in suit, while the acknowledgment of the art referred to lacks one single element.

Redirect examination by JOHN K. BEACH, Esq., counsel for defendants:

R. D. Int. 53. Please state whether or not it is a common contrivance in the mechanic arts, in order to prevent the springing or bending reciprocating rod under lateral pressure to prolong said rod and support said prolonged portion in a guide which receives part of the said pressure?

Ans. Yes, sir; the Brown patent is one illustration of the
191 prolongation of the operating rod beyond the point of connection with the arm, which prolongation would be wholly unnecessary, were it not for the purpose of providing a bearing upon both sides of the said point of connection to resist the lateral strain upon the rod due to the action of that arm.

R. D. Int. 54. State whether or not it makes any difference in the mechanical action of such combination of prolonged rod and guides, whether the said lateral pressure is produced by gravity, by the force of the wind, by the friction of the apparatus itself, or in any other way, other things being equal.

Ans. No, sir, the resisting or acting strain upon the rod would be precisely the same in one case as in the other.

R. D. Int. 56. State whether or not it makes any difference in the mechanical operation of the parts whether the whole combination be used in a horizontal position or in a vertical position.

Ans. None whatever.

R. D. Int. 57. As to the form of guides shown in the drawings of the patent, state whether or not guides intended to hold the rod away from the adjacent supporting surface, and guides intended to hold the rod in contact with the adjacent or supporting surface were both well known in the art, and had both been applied to apparatus for the opening of transoms prior to the patent in suit.

Ans. Yes, sir. The Stickney & McGee patents show the
192 rods supported in guides, so as to work at a distance from the surface to which the guides are attached. The Bailey & McCluskey patent shows the guides constructed so that the operating rods appear to work in close contact with the surface to which the guides are attached, or substantially so.

Recross-examination by EPHRIAM BANNING, Esq., of counsel for complainant:

R. X. Int. 58. Have you ever known of a single case in which any of the devices shown in any of the defendant's patent exhibits has been used in the form shown for any practical purpose whatever?

Ans. I have seen both the Speers patent and the Brown patent devices in use in the form shown; and the device of the Bailey & McCluskey patent I have seen in use in railroad cars. I do no recall having seen the others in use, though I may have done so.

JOHN E. EARLE.

Subscribed and sworn to this 3d day of June, 1889, before me.

FRANCIS G. BEACH, *Spec. Ex.*

193 Circuit Court of the United States, District of Connecticut.

In Equity.

JOHN F. WOLLENSAK *vs.* SARGENT & COMPANY. } Reissue No. 9307.

Evidence in Rebuttal on Behalf of Defendants.

Testimony taken under and pursuant to the 67th rule of the Supreme Court of the United States, in equity, as amended, before Francis G. Beach, notary public and special examiner, pursuant to notice and by consent of parties.

NEW HAVEN, CONN., *Dec. 5th*, 1889—11 o'clock a. m.

Met pursuant to notice.

Present: John K. Beach, Esq., of counsel for defendants.

194 HENRY B. SARGENT, a witness produced by and on behalf of the defendants, having been duly sworn, to interrogatories proposed by JOHN K. BEACH, Esq., of counsel for defendants, testified as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. Henry B. Sargent; I am thirty-eight years of age; reside in New Haven, Conn., and am vice-president of Sargent & Company, the defendant herein.

Int. 2. The complainant Mr. Wollensak in his testimony has stated that he paid $500.00 for the privilege of advertising his transom-lifters in a catalogue which he says was issued by the defendant corporation. Will you please state what is the relation of the defendant corporation to the catalogue or catalogues in which Mr. Wollensak advertised?

Ans. Sargent & Company of New Haven, Conn., is a corporation organized under the laws of the State of Connecticut. Joseph B. Sargent and George H. Sargent, who are large stockholders in the defendant corporation, but who are not by any means the only

stockholders therein, have for many years been engaged in the business in New York city as dealers in general hardware under the firm name of Sargent & Company.

The defendant corporation are not responsible nor liable for any of the contracts of Sargent & Co. of New York city.

195 The New York firm issues once in a few years an elaborate catalogue, part of which is devoted to goods manufactured by Sargent & Co. of New Haven, and a part of the goods of other manufacture.

The entire expense of this catalogue is borne by Sargent & Co. of New York and no part of the money paid by advertisers comes to the defendant corporation. The catalogue is regarded by the trade as a valuable advertising medium, as indicated by the amount of money Mr. Wollensak was willing to pay for his advertisement.

Int. 3. State whether or not there is any agreement, express or implied, extended to advertisers in this catalogue that no advertisement of competing goods shall be admitted thereto.

Ans. There is none. Many competing goods are advertised in the catalogue. In fact when Mr. Wollensak paid $300.00 for his second advertisement, that is the one in the 1884 catalogue, the advertisement of the Reiher transom-lifter had been for several years incorporated in the previous catalogue by insertion sheets, and such sheets are regularly sent when issued to each holder of the catalogue. The advertisement of the Reiher transom-lifter was continued in the catalogue of 1884, pages 408 and 409.

Adjourned for cross-examination.

196 NEW HAVEN, CONN.,
December 11th, 1889—12 o'clock noon.

Met pursuant to adjournment.

Present: John K. Beach, Esq., of counsel for defendants.

Cross-examination of HENRY B. SARGENT:

The cross-interrogatories being proposed by the examiner to the witness, in the absence of counsel for complainant and in accordance with agreement of counsel for the respective parties that the cross-interrogatories should be sent by mail to the examiner and by him proposed to the witness.

X Int. 4. Who are the officers of Sargent & Company of New Haven; who are its largest stockholders; and who are the members of the firm of Sargent & Company of New York?

Ans. The officers of the defendant corporation are Joseph B. Sargent, president; Henry B. Sargent, vice-president; Charles L. Baldwin, secretary; and G. Lewis Sargent, treasurer. The largest stockholders of the defendant corporation are Joseph B. Sargent and George H. Sargent. The members of the copartnership of Sargent & Company of New York are Joseph B. Sargent and George H. Sargent.

197 X Int. 5. What proportion of the stock of Sargent & Company of New Haven is held directly or indirectly by members of the firm of Sargent & Company of New York?

Ans. No stock is held indirectly. About two-thirds of the shares is held individually by Joseph B. Sargent and George H. Sargent.

X Int. 6. What proportion of the balance of the stock of Sargent & Company of New Haven is held directly or indirectly by other members of the Sargent family; and as a matter of fact, is not the company or business a family affair?

Ans. I should say about two-thirds of the remainder is individually held by other members of the Sargent family. As to the rest of the question my answer to the next question will, I think, suffice.

X Int. 7. Without regard to formal liabilities or technicalities, is Sargent & Company of New York merely a part or branch of Sargent & Company of New Haven, or *vice versa?* If you say this is not true, then explain the facts showing the relations of the two concerns fully.

Ans. This is not true. The business of Sargent & Company of New York is really of two classes so far as this question is concerned. They are the selling agents of the defendant corporation and in that capacity their relations with the defendant corporation are very intimate; but they are also selling agents for other manufacturers and deal in goods manufactured by other people, and with
198 such branch of their business the defendant corporation has nothing whatsoever to do, and has no interest directly or indirectly. This distinction holds good as to the catalogue issued by Sargent & Company of New York and so far as it advertises the goods of other people it is not the catalogue of the corporation in any sense, and the corporation does not participate in the profits arising either from the amounts charged to other people for advertising therein nor in the profits of the business of selling the goods so advertised.

HENRY B. SARGENT.

Subscribed and sworn to this 11th day of December, 1889, before me.

FRANCIS G. BEACH,
Special Examiner.

199 United States Circuit Court, District of Connecticut. In Equity.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY.

I, Francis G. Beach, a notary public in and for the State of Connecticut, do certify that the foregoing depositions were taken before me, upon the days in the body of said depositions named, to be used on the part of the defendants in the above-entitled suit.

That said depositions were reduced to writing in the presence of and from the statements of the witnesses who subscribed said depositions.

That the witnesses were duly cautioned and sworn, and subscribed the said depositions before me.

That I am not of counsel or attorney for either of the parties in said deposition and caption named, or in anyway interested in the event of said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 21st day of December, 1889.

FRANCIS G. BEACH,
Special Examiner.

And at the term of said court, held at Hartford on the third Tuesday of September, A. D. 1889, the parties, by their respective counsel, duly appeared and said cause was fully heard; and on the 18th day of January, 1890, opinion of court was filed, in the words and figures following, viz:

200 Circuit Court of the United States for the District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT AND COMPANY. } Nos. 585 and 587.

SHIPMAN, *J.*:

These are two bills in equity, which are respectively founded upon the alleged infringement of the third claim of reissued letters patent No. 9307, dated July 20, 1880, and of the first and second claims of letters patent No. 191,088, dated May 22, 1877, each of said patents having been issued to John F. Wollensak. The original of reissue No. 9307 was dated March 11, 1873, and was for an improvement in transom-lifters. No. 191,088 is for an improved skylight-lifter. Motions for preliminary injunctions were brought in these two cases, and were denied. (33 Fed. Rep., 840.) The opinion upon the motions states the claims which are alleged to have been infringed, and other facts in regard to the character of the patented improvements which need not be repeated.

The invention which was embraced in reissue No. 9307 was declared by the Supreme Court, in Wollensak *v.* Reiher, 115 U. S., 87, to be "the combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, prolonged beyond the junction with the lifting arm, so as to prevent the operating rod from being bent or displaced by the weight of the transom."

This construction was based upon the state of the art at the date of the alleged invention, which was described in both the original and reissued patent as follows:

"Transom-lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting
201 arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed, the

upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting arm.

The object of my invention is to remedy this difficulty, and to such end it consists in providing the proper support or support and guide for the upper end of the lifting rod during its vertical movements and while at rest."

The complainant introduced in evidence the file-wrapper and contents of the appeal to the examiners-in-chief in the matter of this reissue.

In the patentee's statement of his case his attorney says that "prior to Wollensak's invention transom-lifters had been composed of a long vertical rod, arranged to move through guides on the door-casing, its upper end projecting a considerable distance above the upper guide and jointed to the transom by a pivoted-connecting rod. An example of the lifter is shown on the transoms of the examiners-in-chief's rooms."

He then states more at length than in the specification, that the defect in such a lifter was the liability of the rod to be bent by the weight of the transom, and that the remedy was a guide for the upper end of the rod. It thus appears that when the patent was before the Patent Office the guide above the junction of the operating rod with the lifting arm and the prolongation of the rod beyond the junction were represented as constituting the improvement.

The complainant contended upon this hearing that the patentee was the first inventor of transom-lifters who achieved success, and was, in fact, the pioneer in the art; that the invention was
202 really much more than the addition of the upper guide, and consisted also of lower supports and a locking device, and that in addition to the transom, the lifting arm, operating rod, and guides for its upper rod, which are mentioned in the claim as the elements of the combination. The guide near the lower end of the rod, provided with a set-screw, and an intermediate guide should also be properly included as elements in the third claim. It is said that in the description of pre-existing devices it is neither stated nor admitted that anything more than a rod and lifting arm had been used, and that if guides were used they were not supports, and it is truly said that such a device without supports to support the rod or hold it away from the woodwork and without a locking device would be almost useless. It is further said that the guides, set-screw, and the reversable bracket were, in fact, novel methods of accomplishing the particular work which they were made to do, and thus that the Wollensak lifter, as a whole, was a novel and useful product of invention, which deserves to be included within the protection of the second and third claims of the reissued patent.

The adequate answer to these suggestions is, that although it may be true that Wollensak's actual invention included all the details of the device except the rod and the lifting arm and was a substantially entire transom-lifter, yet that his reissued patent as it now exists not only does not make such a broad claim, but confines itself to the narrow limits which have been mentioned. The patentee

declared that his invention consisted in providing the proper support and guide for the upper end of the lifting rod. Upon that theory the invention was presented to the Patent Office, both in the application and upon the appeal. The obvious intent of the patentee and the language of the patent unite in the construction
203 which has been heretofore uniformly given to it. The court cannot broaden the grant beyond the limitations which the patentee himself imposed (Railroad Co. *v.* Mellon, 104 U. S., 112). The effect of the construction which is asked for would be to graft upon the claim an invention not previously "indicated upon its face" nor stated in the specification as one belonging to the patentee. (Day *v.* Fair Haven Railway Co., 132 U. S.)

For the reasons which are given in the former opinion, the improvement, which consists of the extension of the rod and its confinement within an additional metallic loop or eye, does not appear to me to have a patentable character, but to have been the obvious suggestion which would occur to a mechanic. I have no reason to doubt that inventive genius was required and was manifested in the development of the present lifter from a naked rod and a lifting arm, but the improvement which a lifter already furnished, with its rod moving within supporting guides and locked when necessary by a set-screw, does not pass beyond the line of mechanical skill.

The question of patentable invention, in view of the state of the art at the date of the improvement, is also the important one which arises upon patent No. 191,088.

The transom-lifter described in the Wollensak patent of 1874, No. 148,538, had a fixed guide-bar, a lifting arm, a rod for operating it, and a set-screw to hold the rod at a desired point.

The device described in No. 191,088 had a guide-bar for holding and guiding a sliding block which communicated motion to lifting rods, and a locking bolt attached to and moving with the sliding block so as to engage at different points with holes in the guide-bar.

The invention was designed for a skylight, and cords were used instead of a rod to disengage the bolt and to raise or lower the skylight.

204 The locking bolt is disengaged from the hole in which it is held by means of a cord which is attached at each end to the block and extends up over a pulley and down through an eye in the outer end of a locking bolt. The step in advance which was made upon the transom-lifter of No. 148,538 was its locking device. Instead of fastening the rod at any desired point by means of a set-screw, the sliding block is made to engage at different points with holes in the guide-bar by means of a spring-bolt.

The defendant strongly insists that this patent was anticipated by the skylight described in letters patent No. 87668, dated March 9, 1869, to George Hayes.

This skylight had two sashes hinged together at the middle; below the hinge was a pulley, and projecting downward was a fixed bar. A sliding block on the bar was connected by links with both sashes. A cord attached to the slide passed over the pulley. A pull upon the cord raised the slide and the sashes. No locking

device was shown or described. The idea, probably, was to fasten the cords to a cleat. A second form of this skylight was shown which had, instead of a fixed bar, a movable bar connected with the sashes by links. The bar itself was drawn up by the cord; a bolt was attached to the fixed part of the building so as to engage the sliding bar and lock it. This form of the Hayes invention had a stationary bolt which engaged with a sliding bar. No. 191,088 has a sliding block which carries a locking bolt up and down the fixed guide-bar. The Hayes skylight shows that Wollensack was not the first to use a bolt to engage with the part of the mechanism which moved the transom, but the Hayes stationary bolt which was fastened to the building, and which was permitted to engage with holes in a moving rod, is a different thing from a bolt which
205 is carried by a sliding block up and down a fixed guide-bar, and in comparison with a primitive method of locking, which is shown by Hayes' exhibited invention, and I think is also a patentable improvement upon the set-screw of Wollensack's previous patents.

The Reiher lifter, which is shown and described in the Frank A. Reiher patent, No. 226,353, dated April 6, 1880, and is also made and sold by the defendants, has a fixed guide-bar, lifting arms, and a rod for operating them, the upper and enlarged end of the rod being what may properly be designated a sliding block. Upon the block there is a pin, which engages with holes in the guide-bar. A twist of the rod withdraws the pin, and a vertical motion moves the block, which moves the lifting arms. The spring action of the rod, which is equivalent for the cords of the first claim of the Wollensak patent, causes the pin upon the sliding block to engage with holes in the bar. Reiher has taken the Wollensak method of locking by means of a bolt attached to and moving with the sliding block, and has improved it, substituting a pin for the more clumsy bolt, but the infringement is manifest. The second claim of No. 191,088 apparently demands the presence of cords to act upon the spring-bolt in the described manner, and is therefore not infringed.

Let the bill No. 585 be dismissed. In No. 587 let there be a decree for an injunction against the infringement of the first claim of No. 191,088 and for an accounting.

Ephraim Banning and Charles R. Ingersoll, for the complainant; John K. Beach and Benj. F. Thurston, for the defendants.

206 And on the 8th day of February, 1890, order consolidating this case with case No. 586 was passed and filed, in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } In Equity. Nos. 585 and 586.

These two causes being between the same parties and in relation to the same general subject-matter, it is hereby ordered, pursuant

to agreement of counsel for said parties respectively, that they be consolidated and hereafter proceed as one cause, and that the present pleadings stand, without amendment, as the pleadings in the consolidated cause.

N. SHIPMAN,
District Judge.

We hereby consent to and request the entry of the above order.

BANNING & BANNING & PAYSON,
Solicitors for Complainants.
JOHN K. BEACH, *Solicitor for Defendant.*

And on the 28th day of February, 1890, the following final decree was made and entered in said cause, viz:

207 At a stated term of the circuit court of the United States for the district of Connecticut, held at Hartford, within and for said district, on the 28th day of February, 1890.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } In Equity. Nos. 585 & 586. Consolidated.

This cause came on to be heard at this term as to reissue No. 9307 upon pleadings and proofs, and as to reissue No. 10264 upon bill and demurrer, and was argued by counsel, and thereupon, upon consideration thereof, the court holds that reissued letters patent of the United States No. 9307, issued to complainant July 20th, 1880, for an improvement in transom-lifters, are void so far as regards the third claim thereof (the only claim sued on); and that so far as letters patent of the United States No. 10264 are concerned, the bill discloses no equitable cause of action and the demurrer should be sustained.

It is thereupon, on motion of John K. Beach, Esq., solicitor for the defendant, ordered, adjudged, and decreed, and the court does hereby order, adjudge, and decree, that the bill of complaint in this cause (consolidated) be dismissed at complainant's cost, and that the defendant have and recover its costs, to be taxed at one hundred seventy-one and $\frac{10}{100}$ dollars.

N. SHIPMAN,
District Judge.

And thereupon the complainant prays an appeal to the Supreme Court of the United States, which is allowed upon filing a good and sufficient bond, to be approved by the court, in the sum of five hundred dollars ($500).

208 UNITED STATES OF AMERICA, }
District of Connecticut, } *ss:*

I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the annexed papers are copies of the original judgment record, except affidavits used on the motion for a preliminary injunction and formal papers omitted by direction of counsel, in the matter of John F. Wollensak *vs.* Sargent & Company, Nos. 585 & 586 (consolidated), in equity, on file in said court.

Seal of Circuit Court, Connecticut.

In testimony whereof I have set hereto my name officially and the seal of said court, at Hartford, in said district, this 4th day of June, A. D. 1890.

E. E. MARVIN, *Clerk.*

Endorsed on cover: Case No. 14,103. Connecticut C. C. U. S. No. 150. John F. Wollensak, appellant, *vs.* Sargent & Company. Filed August 18, 1890.